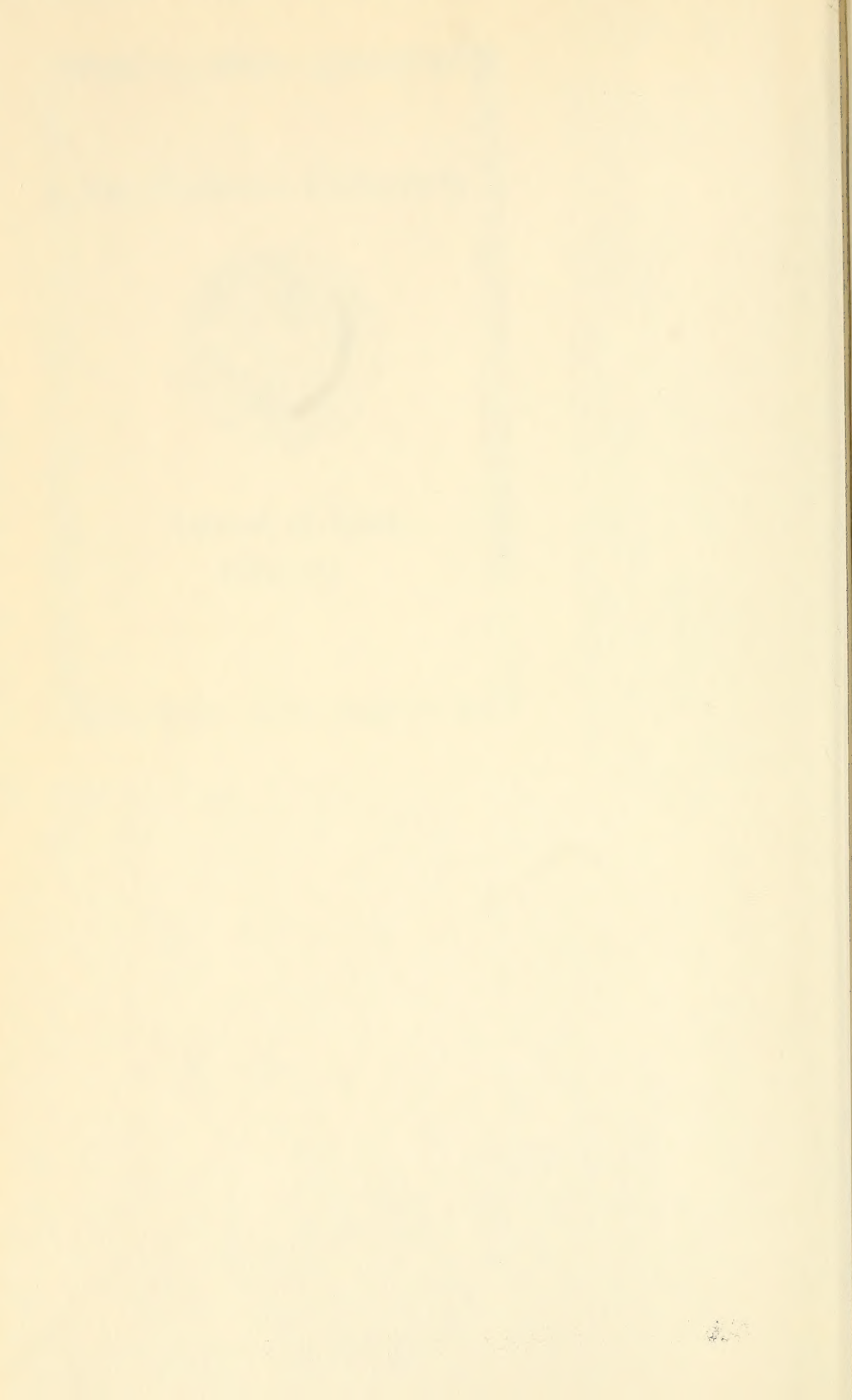




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**EXECUTIVE PRIVILEGE
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**HEARINGS
BEFORE THE
SUBCOMMITTEE ON
INTERGOVERNMENTAL RELATIONS
OF THE
COMMITTEE ON
GOVERNMENT OPERATIONS
AND THE
SUBCOMMITTEES ON SEPARATION OF POWERS
AND
ADMINISTRATIVE PRACTICE AND PROCEDURE
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-THIRD CONGRESS
FIRST SESSION
ON
S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142,
S. 1520, S. 1923, and S. 2073**

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EXECUTIVE PRIVILEGE

PART I—LAW REVIEW ARTICLES AND STATEMENTS OF LEGAL SCHOLARS

[Reprinted by permission. 12 *UCLA Law Review* 1044 (1965)]

EXECUTIVE PRIVILEGE V. CONGRESSIONAL INQUIRY

(Raoul Berger*)

PART I

For more than a century Congress and the President have been stubbornly engaged in a boundary dispute bottomed on irreconcilable claims to constitutional power. Pitted against a claimed absolute executive discretion to withhold information is a claimed plenary congressional power to demand it. Although boundary disputants are notoriously unwilling to relinquish their claims it is yet remarkable that the issue has never been submitted to the courts, for ours is a land, as de Tocqueville early observed, where "scarcely any political question arises . . . that is not resolved, sooner or later, into a judicial question."¹

The preference of the disputants for the recurrent skirmishing of a Cold War, some suggest, may be attributable to uncertainty as to their respective rights, or to an expression of the American genius for political compromise, an outgrowth of the "system of checks and balances."² There is little if any historical warrant, I propose to show, for the notion that executive privilege was ever intended to be among the checks on the legislative power of inquiry. And in evaluating the "compromise," one should consider not only the historical validity of the respective positions but also the cost of the dispute in terms of impaired governmental efficiency. As one watches the legislative process grind to a halt for long-drawn bickering about the congressional right to often innocuous information, one is led to ask with Senator Neely whether the time has not come to submit the "intolerably prolonged controversy" to the courts.³

* Visiting Professor, University of California Law School, Berkeley; former General Counsel to the Alien Property Custodian; former Chairman, Section of Administrative Law, ABA. The related question of what information the public, as distinguished from the Congress, is entitled to obtain, is not discussed in this article. The writer is indebted to Dean Edward L. Barrett and Professor Albert Ehrenzweig for criticism.

The volume of citations makes it necessary to employ abbreviations for frequently cited authorities. See Appendix for key.

¹ 1 DE TOCQUEVILLE 280. See also Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 895 (1953) ("By the very nature of our Constitution, practically every political question eventually, with us, turns into a judicial question").

² Bishop 477, 491; Kramer & Marcuse 916; Younger 784.

³ Kramer & Marcuse 867. Republican Senator Carlson agreed with Senator

Each generation tends to read history in the focus of its own preoccupations; each thinks that it enjoys a special vantage point. So it is that a contemporary reevaluation of the historic controversy must be colored by two important events of our time. The first of these was an elaborate memorandum delivered to the Senate by Attorney General Rogers during the Eisenhower Administration, pressing the claim of "executive privilege" to its utmost extreme: "*uncontrolled discretion*" to withhold.⁴ And the reduction of that claim to practice, happily illustrated by a "casebook" of examples for the 1954-1957 period, facilitates an evaluation of the practical consequences which flowed from the exercise of such discretion.⁵ The second event was the Draconian edict issued by President Kennedy to the executive branch whereby, but for one instance, he cut off all resort to executive privilege.⁶ His action may once and for all have exorcised a ghost: the idea that free congressional inspection of executive documents would cause the executive branch to "disappear from our polity, leaving in its place another unfortunate example of government by legislature."⁷ For executive towers have not toppled, nor have prophecies of doom been realized.

Neely. *Ibid.* In 1956 a Senate Committee recommended that "steps be taken by the several committees to provide a test in the courts to determine the respective powers of Congress and the executive agencies." *Id.* at 877.

For similar subsequent utterances, see Gov't Info. Memo. 48.

⁴ Att'y Gen. Memo.

⁵ Kramer & Marcuse. And "this discussion, lengthy as it may appear, does not and cannot possibly, include all the incidents which occurred from 1953 to 1960." *Id.* at 898. Although the article professes to cover the years 1953-1960, *id.* at 624, the vast bulk of it is devoted to the years 1954-1957, being largely based on agency replies to congressional requests for a compilation of refusals. *Id.* at 628. The authors list one refusal in 1958, *id.* at 877; two in 1959, *id.* at 849-52; and the U-2 incident in 1960, *id.* at 891. One may conjecture that the years 1957-1960 would yield as rich a harvest as the 1954-1957 period.

⁶ Gov't Info. Memo. 43. See also note 548 *infra*.

I would not suggest that President Kennedy's retreat from the broad withholdings of the Eisenhower period reflects a peculiar Democratic tenderness for congressional sensibilities, for Democratic Presidents Cleveland, Franklin D. Roosevelt and Truman too have withheld information from Congress. Att'y Gen. Memo. 14-16, 23-30. President Kennedy's drastic curtailment of claims of executive privilege is possibly attributable to his first hand familiarity as a member of both houses with congressional inquiries, and to Attorney General Robert Kennedy's earlier frustrations as chief counsel to a Senate investigating committee. Kramer & Marcuse 831. Assistant Attorney General Norbert A. Schlei, testifying before a Senate Subcommittee on Oct. 31, 1963, said that: "The Attorney General [Kennedy], in part as a result of his experience here on Capitol Hill, has an intense and abiding interest in the matter of public access to official information." *Moss Hearings* 195.

Similarly, the frequent references herein to practices during the Eisenhower Administration are without political motivation but are based instead on the fact that it was his Attorney General who first advanced a claim to "uncontrolled discretion" and the fact that the Kramer and Marcuse "casebook" massively illustrates the practices during the 1954-1957 period, thereby facilitating consideration of how the claim operated in practice.

⁷ Kramer & Marcuse 906; Younger 771. Bishop 486, opined that whereas the

As might be expected, the sharpened executive-legislative conflict which characterized the Eisenhower era produced a flood of commentary, ranging through Aristotle and Montesquieu to President Truman, from the implications of the separation of powers and our democratic system to practicalities of government.⁸ Adherents of executive privilege have argued chiefly from the separation of powers,⁹ apparently viewing it as a self-defining concept on which one may confidently erect a logical system. They have largely disregarded parliamentary and colonial history prior to the adoption of the Constitution, without which "the language of the Constitution cannot be interpreted safely."¹⁰ For the threshold question is: What does the separation of powers separate? What were the attributes and powers of the separate branches created by the Framers? On this issue, in Holmes' phrase, "a page of history is worth a volume of logic."¹¹

The appeal to history is itself the subject of wide-ranging debate, of which only the barest hint can, and yet must, here be given. For the function of history in the construction of the Constitution is central to the role of the Court in our democratic system. Behind the insistence of Jefferson and Madison that the

withholding practiced by the Eisenhower administration was "quite tolerable, unlimited congressional access to executive information . . . would almost certainly be intolerable." For further discussion, see notes 555-59 *infra*.

⁸ Proponents of "executive privilege" are generally either past or present members of the executive branch. Att'y Gen. Memo.; Bishop; Kramer & Marcuse; Philos.; Wolkinson. A private proponent of the privilege is Younger.

The congressional view has been espoused by a counsel to a congressional committee; e.g., Mitchell; by a former counsel, Schwartz; by a scholar, Collins; and by a newspaper editor, Wiggins. For additional authority, see GELLHORN & BYSE 615.

The present writer was one of a panel with Dean Frank C. Newman and Professor Kenneth Culp Davis which was retained in 1959 to advise the Comptroller General as to his right to insist on delivery of an Inspector General's report in light of the Air Force's refusal to furnish it as required by statute. Now, after a lapse of six years, a sojourn in the Groves of Academe has afforded an opportunity to restudy the entire matter, to do further research and to make a fresh and disinterested appraisal.

⁹ Younger; Att'y Gen. Memo. 3. Cf. Kramer & Marcuse 899, 905.

¹⁰ *Ex parte* Grossman, 267 U.S. 87, 108 (1925). "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Convention of the Thirteen States, were born and brought up in the atmosphere of the common law and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of a fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood." *Id.* at 108-09. See also *Popovici v. Agler*, 280 U.S. 379, 383-84 (1930); *South Carolina v. United States*, 199 U.S. 437, 450, 456 (1905).

¹¹ *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

sense in which the Constitution was adopted is the only safe mooring¹² lurked the fear that a Court freed of the restraints of that "meaning"¹³ would be free to give effect to its personal predilections and to become a super-legislature.¹⁴ Were the American people to be persuaded that controversial decisions proceed from just such predilections rather than from constitutional imperatives, the place of the Court in the scheme of things would be dangerously undermined.¹⁵ Opposed to the Madisonian "strait jacket" approach is Marshall's view that an expanding nation requires a Constitution that can be "adapted to the various crises of human affairs."¹⁶ When "adaptation" has been thought to approach "amendment" there have not been wanting voices to remind us that the Constitution provided a special machinery for amendment.¹⁷ If it is "cumber-

¹² In the very first Congress, Madison said: "The decision that is at this time made, will become the permanent exposition of the constitution; and on a permanent exposition of the constitution will depend the genius and character of the whole Government." 1 ANNALS OF CONG. 514 (1789-1791). Later he wrote with respect to "the sense in which the Constitution was accepted and ratified by the Nation": "In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers." 9 WRITINGS OF MADISON 191, 372 (Hunt ed. 1906).

Jefferson said: "Our peculiar security is in the possession of a written constitution. Let us not make it a blank paper by construction." PATTERSON 70.

Professor Bickel remarks about Chief Justice Taney's "meticulous adherence to original intent" in *Dred Scott v. Sanford*, 19 How. (60 U.S.) 393, 426 (1856), that "such views, when they prevail, threaten disaster to government under a written constitution." Bickel, *The Original Understanding* 3. Taney's "history" was at best debatable. McLAUGHLIN 559, 561-62. And it was not resort to this history but the misguided attempt, expressing a conviction shared by Justice Curtis, to "quiet all agitation on the question of slavery in the territories," HOCKETT 239, which propelled the Court into an area for which the judicial process was utterly unsuited. No judicial oil upon the waters could quell a dispute that shortly was to tear the nation apart.

But, as Professor Bickel states, "it is a long way from rejection" of the Taney doctrine "to the proposition that the original understanding is simply not relevant. For arguments based on that understanding have a strong pull. . . . And they have been relied on by judges well aware that it is a constitution they were expounding." Bickel, *The Original Understanding* 3-4.

¹³ For an acute analysis of the pitfalls that beset the search for historical meaning, see Wofford.

¹⁴ Professor Bickel justly remarks that were the ultimate "reality" that judicial review spells nothing more than "personal preference," then judicial "authority over us is totally intolerable and totally irreconcilable with the theory and practice of political democracy." BICKEL, LEAST DANGEROUS BRANCH 80. See also *id.* at 93.

¹⁵ The people "are unwilling to admit that the Constitution is, as Charles Evans Hughes said, 'what the judges say it is.'" Tweed 38.

Compare the recoil from the laissez faire reading of the 1920's and 1930's. BICKEL, LEAST DANGEROUS BRANCH 45.

¹⁶ *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 414 (1819). Charles Curtis maintained that, "only present meanings are pertinent. We cannot have our government run as if it were stuck in the end of the eighteenth century when we are in the middle of the twentieth." CURTIS 64, 68.

¹⁷ *Cf.* the dissenting opinion of Mr. Justice Black, who was joined by Justices

some,"¹⁸ it was made so in order to brake hasty majority action that might imperil minorities.¹⁹ But whatever the merits of the appeal to history, it has been the almost invariable practice of the Court, with varying degrees of conviction, to turn to history for guidance.²⁰ For present purposes, it suffices to regard historical evidence, not as conclusive, but as a necessary beginning upon which we can rely until, in Holmes' phrase, "we have a clear reason for change."²¹ The clinical materials for the 1954-1957 period afford a convenient means of assaying the practical "reasons for change."

One who would espouse the claim of Congress to be fully informed must face up to the fact that the rampant excesses of the McCarthy Senate investigations left the process in bad odor.²² McCarthyism was itself but the full blown exemplar of an earlier practice, of which the Supreme Court gently stated that "following World War II, there appeared a new kind of Congressional inquiry

Harlan and White in *Bell v. Maryland*, 84 Sup. Ct. 1814, 1864, 1877 (1964): "And in recalling that it is a Constitution 'intended to endure for ages to come,' we also remember that the Founders wisely provided for the means of that endurance. Changes in the Constitution, when thought necessary, are to be proposed by Congress or conventions and ratified by the States. The Founders gave no such amending power to this Court."

¹⁸ Cf. BICKEL, *LEAST DANGEROUS BRANCH* 106.

¹⁹ In the Virginia Ratification Convention, Patrick Henry pointed out that: "A bare majority of these four small states may hinder the adoption of amendments; so that . . . one twentieth part of the American people may prevent the removal of the most grievous inconveniences and oppression, by refusing to accede to the most salutary amendments." 3 ELLIOT'S DEBATES 50 (2d ed. 1941). But the Constitution was designed as a bulwark for minorities; and it can be sapped by free-wheeling interpretation.

²⁰ In *Bell v. Maryland*, *supra* note 17, where Mr. Justice Black condemned judicial "amendment," Mr. Justice Goldberg, whose substantive views were diametrically opposed to those of Mr. Justice Black, agreed with him that, "of course our constitutional duty is, to construe, not to rewrite or amend, the Constitution! . . . Our sworn duty to construe the Constitution requires, however, that we read it to effectuate the intent and purposes of the Framers." 84 Sup. Ct. at 1849. See also *United States v. Barnett*, 376 U.S. 681 (1964), where both the majority and dissenters appealed to history for confirmation of opposing views. As Professor Bickel says, historical materials "are of crucial significance to any conceivable process of judicial review and in one fashion or another, and to one end or another, they have been consulted throughout the recorded experience of the Supreme Court." BICKEL, *LEAST DANGEROUS BRANCH* 98. For additional reflections on the subtle problems presented see *id.* at 86, 90, 94, 99-110, 236-37. See also HURST, *THE ROLE OF HISTORY* 55.

²¹ HOLMES 290. Or, as a vigorous critic of the appeal to history has recently put it, historical "inquiry may well lead the judge to view the historical evidence as a kind of hurdle—not something binding, but something which only a strong modern justification can overcome." Wofford 532. On any theory it is incompatible with the lofty role of the Constitution to "expand" it as waywardly as an accordion.

²² For details see BARTH 26, 40-65, 83, 154-55; TAYLOR 122-35, 266-69, 184-85. Taylor wisely counsels that "we must not allow general conclusions about Congressional investigations to be determined by our personal approval or disapproval of individual investigators, be they Senator McCarthys or Ferdinand Pecoras." *Id.* at 83.

unknown in prior periods of American history."²³ Even the once perfervid admirer of the investigatory function, Mr. Justice Frankfurter,²⁴ was constrained to say that "we would have to be [a] . . . 'blind' Court . . . not to know that there is wide concern, both in and out of Congress, over some aspects of the exercise of Congressional power of inquiry."²⁵ The McCarthean effrontery left the more enduring impress because the Senate never saw fit to curb or censure him for his perversion of the investigatory function.²⁶ Closer oversight by Congress of its less responsible committees would go far to restore sympathy for its claim to be informed.²⁷ And Congress might profitably emulate the self-discipline of Parliament, which made possible the sharing of the most vital secrets in the midst of World War II.²⁸

But "if Congressional use of the power to investigate produced occasional excesses, it also produced tremendous boons."²⁹ We need only recall the benefits which flowed from the Senate investigation of the Teapot Dome scandals.³⁰ Corruption and mismanagement have

²³ *Watkins v. United States*, 354 U.S. 178, 195 (1957). An historian recently stated that "after generations of orderly and stable government, the greatest nation in the world, victorious in a global conflict but terrified by strange fantasies, hounded and harassed a handful of domestic Communists. Long instructed in the way of freedom, powerful and united, the United States gave way in the twentieth century to panic fears, enacting legislation in the name of 'internal security' that later historians may well judge far more harshly than the Alien and Sedition Acts." 2 PAGE SMITH 977.

²⁴ "The power of investigation should be left untrammelled." Frankfurter, *Hands Off the Investigations*, 38 New Republic 329, 331 (1924). This was said of the Teapot Dome investigation which struck paydirt. See note 31 *infra*.

²⁵ *United States v. Rumely*, 345 U.S. 41, 44 (1953).

²⁶ "It is especially noteworthy, as Senator Monroney pointed out on the closing day of debate, that Senator McCarthy was not censured for his misuse of the Senate's investigatorial prerogatives, for his attack against the Executive Branch, or for his treatment of anyone other than his fellow-senators. He was censured only for his sulphurous reaction to the Senate's undertaking to investigate and judge him—i.e., for obstructing rather than for abusing the Senate's power." TAYLOR 134.

²⁷ A Special Committee of the American Bar Association reported in 1954 that "the whole history of investigations, confirmed by current examples, shows that it is not enough to create committees and let them proceed as they see fit, often at the whim of the chairman. The scope of their operations should be subjected to continuing congressional scrutiny by the whole of the particular House, through a specific group to which is delegated the express duty of supervision of the committees." BARTH 201-02.

²⁸ See note 534 *infra*.

²⁹ BARTH 14.

³⁰ See Professor Frankfurter's remarks, *infra* note 31. Clark R. Mollenhoff stated that: "Past history should pretty well demonstrate that the executive branch does not do a good job of investigating itself. This is particularly true of the Military Establishment. It was the Congress that revealed the scandals involving Gen. Benny Meyers. It was the Congress that pulled loose the scandals involving Harry (the Hat) Lev and the New York procurement office. It was the Congress that produced the 'Chamber of Horrors' on military buying practices generally. It was the Congress that revealed the details of the classic military corruption and

repeatedly come to light over strenuous executive opposition only because of congressional investigation.³¹ Well could Woodrow Wilson, a student of government and history, say in 1885: "Unless Congress have and use every means of acquainting itself with the acts and disposition of the administrative agents of the government, the country must be helpless to learn how it is being served. . . ."³²

The starting point, therefore, must be a congressional function which has proven its value repeatedly over the years. Growing resort by the executive branch to "uncontrolled discretion" to withhold information from Congress must in time rob the country of the benefits which flow from legislative inquiry into executive

mismanagement in the construction of an airstrip at Fort Lee, Va. These scandals were actually being hidden or disregarded by the Pentagon until the Congress stepped in. . . . We should remember that the Symington Armed Services Subcommittee has demonstrated that several billions of dollars were wasted in the stockpiling of strategic and critical material. A vast curtain of secrecy covered the stockpile purchasing and the political letters and questionable decisions that went into the creation of that \$9 billion stockpile." 109 CONG. REC. 3204 (1963) (Address of Clark R. Mollenhoff).

³¹ Writing in 1924 of the Teapot Dome investigations, Professor Frankfurter stated that "the bills filed by the government against the Sinclair and Doheny leases are based upon the findings of the Walsh committee, namely, corruption and conspiracy rendered possible through Secretary Fall's corruption and Secretary Denby's guileless incompetency; the disgrace of, and pending grand jury inquiry into a recent member of the Cabinet—Fall, the dismissal of a third member—the Attorney General [Harry Daugherty]—because of an enveloping, malodorous atmosphere." Frankfurter, *supra* note 24, at 329-30. All of this in face of the fact that: "For nearly two years the efforts to uncover wrongdoing in the disposal of our public domain were hampered by every conceivable obstruction on the part of those in office." *Id.* at 330.

Compare this with President Coolidge's blocking of a Senate investigation of Secretary of the Treasury Andrew Mellon's corporate holdings. The Senate had appointed a committee to investigate the Bureau of Internal Revenue in order "to obtain information upon which to recommend to the Senate reforms in law and in administration of the Bureau." Coolidge said: "Seemingly the request for a list of the companies in which the Secretary of the Treasury was alleged to be interested, for the purpose of investigating their tax returns, must have been dictated by some other *motive* than a desire to secure information for the purpose of legislation . . ." and therefore refused the list. Att'y Gen. Memo. 19-20. (Emphasis added.) But "motives alone would not vitiate an investigation . . . if that assembly's legislative purpose is being served . . . [even where the] true objective of the Committee . . . was purely 'exposure.'" *Barenblatt v. United States*, 360 U.S. 109, 132 (1959). The Senate justifiably could be interested in Mellon's vast corporate empire and its impact on his Treasury activities.

³² Quoted in *United States v. Rumely*, 345 U.S. 41, 43 (1953). Judge Wyzanski stated: "Congressional investigations are only one, if an extreme example of our belief that exposure is the surest guard . . . against official corruption and bureaucratic waste, inefficiency and rigidity. . . . That this confidence in legislative investigations as a prophylactic is not absurd is demonstrated to some extent by the difference in the strength and survival quality of democracy in English-speaking countries where such investigations are encouraged and Continental countries where they have been held within close bounds. . . . Perhaps France would have been better off if the Stavisky scandal had been investigated rather than hushed up." Wyzanski 102.

conduct.³³ Few would deny that, as a practical matter, resort to unlimited executive privilege could cripple the Congress and render it impotent to carry out its functions.³⁴ That information is far more frequently furnished than withheld³⁵ is beside the point, because investigation is hobbled at the outset if the executive branch may determine what Congress shall see and hear. How can that determination safely be left to the object of investigation? In measuring on practical grounds the assertion of executive power to determine what Congress may safely see, we do well to bear in mind the words of Mr. Justice Jackson, who knew from the inside the power and leverage of the executive establishment:

I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of the Congress.³⁶

If the relative immunity of the executive departments from judicial review is not as extensive as that afforded the President, it has yet become so broad in practical effect as to give pause before adding to it immunity from congressional inquiry except by executive leave.³⁷ That way lies the road to bureaucratic irresponsibility.

³³ The fact that the Johnson Administration presently is exercising commendable restraint merely postpones the problem whether the legislature's crucial need for information can be left to executive mercies. The point is made by the 1963 Memo. of the House Government Operations Subcommittee under the sympathetic Chairmanship of Congressman John E. Moss: "The powerful genie of executive privilege momentarily is confined but can be uncorked by future Presidents." Gov't Info. Memo. 49.

³⁴ Recent privilege proponents say that "undue secrecy may seriously cripple the legislature and promote official arrogance and inefficiency as well as fiscal laxity . . . government without investigation might easily turn out to be democratic government no longer." Kramer & Marcuse 915-16. See also note 779 *infra*; TAYLOR 97; Younger 775. Acting Director Saccio of the International Cooperation Administration, testifying with respect to a refusal to furnish an ICA evaluation of its Vietnam program, said: "[I]f ICA wanted to apply the 'executive privilege' GAO [General Accounting Office] would not see one thing because practically every document in our agency has an opinion or a piece of advice." Kramer & Marcuse 852. That possibility had been foreseen by Taylor when he said: "A very large part of administrative work consists of advice and communication between and among government officials. If President Eisenhower's directive [of May 17, 1954, responding to the McCarthy-Army controversy] were applied generally in line with its literal and sweeping language, Congressional committees would frequently be shut off from access to documents to which they are clearly entitled by tradition, common sense, and good governmental practice." TAYLOR 133. As will appear below, the executive branch has more than once flaunted "tradition and common sense."

³⁵ Kramer & Marcuse 623; Bishop 489.

³⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (concurring opinion). For the views of the Founding Fathers, see text accompanying notes 132-42 *infra*.

³⁷ Warner Gardner remarked that in many cases "the administrative discretion is in practical effect final and beyond revision by the courts, the Congress or the Executive," GELLHORN & BYSE 24, and that the agencies "are usually beyond any

Nor need an absolute congressional power to demand be substituted for an absolute executive power to withhold information. Constitutional absolutes are justly regarded with skepticism; scarcely a right or power asserted under the Constitution is free from the need to be accommodated with another. The powers of Congress and the executive, as former Assistant Attorney General Kramer said, "are neither absolute nor mutually exclusive," rather "both powers are of equal dignity."³⁸ But apparently the executive, to borrow Orwell's phrase, is "more equal" than Congress. The absence of privilege, argued Mr. Kramer, would render Congress "superior" because the executive would have to surrender all information demanded by Congress.³⁹ By opting for executive discretion to determine what Congress may see, however, he would make the executive superior. What Mr. Kramer leaves implicit was unabashedly asserted by Attorney General Rogers: "the President and heads of departments must and do have the last word."⁴⁰ Tested by history or practical dictates of government this assertion is dubious in the extreme.⁴¹ And it would be disadvantageous to leave either branch at the mercy of the other in the demarcation of their constitutional boundaries. This raises a key question: Are the courts—the traditional arbiters of constitutional boundaries—authorized to settle disputes between the legislative and executive branches as to the scope of their

systematic control by the legislature or the executive, while judicial review of most agencies can operate only on the edges and not at the center of the administrative process." *Id.* at 31. This can be said with equal justice of administration by the departments. Senator Paul Douglas has remarked that "out of a deep instinctive wisdom, the American people have never been willing to confide their individual or collective destinies to civil servants over whom they have little control." *Id.* at 182-83. It is not enough that the increasingly broad legislative delegations have aroused uneasiness because of the trend from "representative government toward bureaucratic ascendancy," GRIFFITH 2: now the bureaucracy would censor what Congress may see.

³⁸ Kramer & Marcuse 915.

³⁹ *Id.* at 910.

⁴⁰ Att'y Gen. Memo. 46. Indeed, he all but warned the courts to keep their hands off the executive. See text accompanying note 321 *infra*. See also note 316 *infra*.

"What could be better evidence of complete dependence than to subject the validity of the decision of one 'Department' as to its authority on a given occasion to review and reversal by another whose own action was conditioned upon the answer to the same issue? Such a doctrine makes supreme the 'Department' that has the last word." HAND 4. The view that "prevailed," said Judge Hand, was "that it was a function of the courts to decide which 'Department' was right, and that all were bound to accept the decision of the Supreme Court." *Id.* at 3.

⁴¹ Moreover, to leave to the President the determination in any particular case whether the public interest permits disclosure is to "leave open the possibility that the President may abuse his prerogative, especially in instances where the information would reflect unfavorably on him or his administration of the nation's affairs." TAYLOR 101. The realization of this possibility during the Eisenhower Administration is hereafter discussed.

respective powers? Or are such disputes nonjusticiable "political questions," as has been generally assumed?⁴² It is time to inquire whether the "political question" cases sustain the assumption that the colliding claims of Congress to demand and of the executive branch to withhold information are nonjusticiable, the more so since other comfortable assumptions have been swept away by the thundering avalanche that was *Baker v. Carr*.⁴³

It has been observed, not unjustly, that there has been a "plethora of *ipse dixit* on both sides of the [executive privilege] question."⁴⁴ The unhappy alternative to *ex cathedra* utterance is exposition and refutation in detail. What follows is an attempt to grasp the nettle, sift competing views, and frame issues in order to present a coherent panorama of the field.

I. HISTORY OF LEGISLATIVE POWER TO INQUIRE INTO EXECUTIVE CONDUCT

The broad power of Congress to inquire into executive conduct is deeply rooted in parliamentary and colonial history and was immediately asserted by the first Congress. So much has received express recognition by the Supreme Court in *McGrain v. Daugherty*.⁴⁵ The narrow issue in *McGrain* was whether a private person,

⁴² See note 708 *infra*.

⁴³ 369 U.S. 186 (1962).

⁴⁴ Bishop 483. Consider the Attorney General's statement that "courts have uniformly held that the President and heads of departments have an uncontrolled discretion to withhold. . . ." Att'y Gen. Memo. 1. See also *id.* at 32. This has been termed a "remarkable and inexact assertion," Bishop 478 n.5, and "utterly unsupported by any case." Schwartz 13. Cf. text accompanying notes 308-09 *infra*. Though the author concurs in these views, the Attorney General's collection of "authorities" for this proposition requires more than out-of-hand dismissal if only because of the weight that ordinarily attaches to an opinion (here furnished to the Senate) of the chief law officer of the United States.

In an address before the Massachusetts Historical Society Wiggins said that: "Unless historians bestir themselves . . . the lawyers' [*i.e.*, the Attorney General's] summary that has placed 170 years of history squarely behind the assertion of unlimited executive power to withhold information, threatens to get incorporated into that collection of fixed beliefs and settled opinions that governs the conduct of affairs. History may thereafter become what the lawyers mistakenly said it was theretofore." Wiggins, *Lawyers as Judges of History*, 75 Mass. Hist. Soc. Proc. 84, 104 (1963).

⁴⁵ 273 U.S. 135 (1927). "In actual legislative practice power to secure needed information by such [investigatory means] has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution. . . . This power was both asserted and exerted by the House of Representatives in 1792, when it appointed a select committee to inquire into the St. Clair expedition. . . ." *Id.* at 161.

At the time of *McGrain*, it was not yet fashionable to cite law review articles, but internal evidence discloses heavy reliance on the then recently published historical studies by Potts and Landis. Cf. TAYLOR 61-62.

the brother of the Attorney General, could be summoned by the Senate in an investigation into the Attorney General's conduct of the Department of Justice. But the determination that "the administration of the Department of Justice . . . and particularly whether the Attorney General and his assistants were performing or neglecting their duties . . ." was within Congress' jurisdiction carries analysis a long way.⁴⁶ It is now established that the investigatory

Potts is cited in *Jurney v. McCracken*, 294 U.S. 125, 149 (1935), and *Landis in Barenblatt v. United States*, 360 U.S. 109, 112 (1959) (for proper perspective of "Congressional power of inquiry").

⁴⁶ 273 U.S. at 177. The Attorney General astonishingly misconceives the effect of *McGrain v. Daugherty*. Att'y Gen. Memo. 71. In the interest of clarity each of his propositions will be treated separately. Regrettably, refutation of error requires more space than its propagation. The Attorney General states: "How is the United States Supreme Court likely to decide the issue concerning the *withholding of confidential papers* by the executive branch from Congress and its committees? The case of *McGrain v. Daugherty* points to the following conclusions:

(a) The Houses of Congress have, in the past exceeded their powers, both with respect to their attempted punishment for contempt of private persons and of a United States official, and the Supreme Court did not hesitate to reject the improper assertions of congressional power." *Ibid.* (Citing *Kilbourn v. Thompson*, 103 U.S. 168 (1881) and *Marshall v. Gordon*, 243 U.S. 521 (1917)).

In fact, *McGrain* rejected *Kilbourn's* historically unsound intimations that "neither house of Congress has power to make inquiries and exact evidence in aid of contemplated legislation." 273 U.S. at 171. Compare *id.* at 174. *McGrain* explained further that in *Kilbourn* "the resolution contained no suggestion of contemplated legislation; that the matter was one in respect to which no valid legislation could be had; that the bankrupt's estate and the trustee's settlement were still pending in bankruptcy court," and consequently, that the House had exceeded its powers and assumed to exercise clearly judicial power. *Id.* at 171. Mr. Justice Frankfurter remarked in *United States v. Rumely*, 345 U.S. 41, 46 (1953), upon the "inroads" made by *McGrain* upon *Kilbourn*.

Marshall v. Gordon, 243 U.S. 521 (1917), is even further afield. *McGrain* explains that there the issue was whether the House could punish for contempt a district attorney who sent an "irritating" letter to a Committee Chairman, and the Court emphasized that the "power to make inquiries and obtain information by compulsory process was not involved." 273 U.S. at 173. All that was decided in *Marshall* said *McGrain*, was that the House could not punish for contempt because the letter "was not calculated or likely to affect the House in any of its proceedings or in the exercise of any of its functions. . . ." *Ibid.* Both *Kilbourn* and *Gordon* are therefore totally irrelevant to the "withholding of confidential papers by the executive branch from Congress" when it seeks information in aid of legislation, appropriation or investigation of executive conduct.

The Attorney General states: "(b) Ever since 1796, the executive branch has asserted the right to say 'no' to the Houses of Congress, when they have requested confidential papers which the President or the heads of departments felt obliged to withhold, in the public interest. Since 1800, court decisions have uniformly held that the president or heads of departments need not give testimony or produce papers which, in their judgment, require secrecy." Att'y Gen. Memo. 71. This paragraph suggests that the courts have "uniformly" sustained executive refusals to furnish information to Congress. Certainly the case of *McGrain v. Daugherty* contains not the slightest intimation to this effect. No case has so held, see note 309 *infra*, and as will appear, no case cited by the Attorney General supports such a proposition. There is no absolute executive privilege to withhold even from private litigants. See text accompanying note 412 *infra*.

power of Congress "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."⁴⁷

Since Congress is thus empowered to investigate the Attorney General, it should logically follow that it may call upon him or any of his assistants for information or documents. Not so, intimates Attorney General Rogers:

[T]he reason the court found a legislative power to summon *private persons* for inquiry, in connection with the exercise of the legislative function, was because of a *practice*, long continued, of summoning private persons before the House of Congress . . . ⁴⁸

This is to stage Hamlet without the Dane. As a practical matter, the Attorney General's suggestion that executive officers themselves

The Attorney General states that: "(c) Never in our entire history has either House of Congress taken any steps to enforce requests for the production of testimony or documents which have been refused by the executive branch.

"The foregoing, in the words of the Supreme Court in the *Daugherty* case, point 'to a practical construction, long continued, of the constitutional provisions respecting their powers,' by the executive and legislative branches. The long-continued practice of the executive branch, and the passage of no law by Congress to change that practice argue, persuasively for the possession of such a power, under the Constitution by the executive. The United States Supreme Court is not likely to ignore more than 150 years of legislative acquiescence in the assertion of that power." Att'y Gen. Memo. 71. (Emphasis added.) The suggestion that *McGrain* approves a practical construction "by the executive branch," perverts its meaning. The Supreme Court, after alluding to the fact that *both houses* of Congress early took the Colonial view that the power of inquiry was an "essential auxiliary" to the "legislative function," concluded that the *Congressional*, not the Executive, "practice . . . falls nothing short of a practical construction, long continued, of the constitutional provisions respecting *their powers*, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful." 273 U.S. at 174. (Emphasis added.) Having approved this "essential auxiliary" for the purposes of sustaining the summoning of witnesses in an investigation of the Department of Justice, *McGrain* scarcely intended to approve a claim of executive privilege to withhold information that would abort it.

Again, the Attorney General's statement that Congress has passed "no law to change that practice" is belied by the facts. See text accompanying notes 349-53 *infra*.

For comment on the "150 years of legislative acquiescence," see text accompanying notes 111-13 *infra*.

⁴⁷ *Watkins v. United States*, 354 U.S. 178, 187 (1957). See also *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). Referring to a House Resolution which in part related to "alleged abuses in post officers, navy-yards, public buildings, and other public works of the United States," President Buchanan stated to the House in a Message of March 28, 1860: "In such cases inquiries are highly proper in themselves and belong equally in the Senate and the House, as incident to their legislative duties and being necessary to enable them to discover and to provide the appropriate legislative remedies for any abuses which may be ascertained." 5 RICHARDSON 614.

⁴⁸ Att'y Gen. Memo. 64. (Emphasis added.) The district court, however, had held the inquiry improper because it saw "no reason why the information . . . cannot be obtained *without calling outsiders*." *Ex parte Daugherty*, 299 Fed. 620, 640 (S. D. Ohio 1924). (Emphasis added.)

are shielded from summons has little to commend it. To restrict Congress to inquiry of "private persons" when only the official himself can supply information shedding light on public expenditures or mismanagement is to hamstring the power. The first one in line for interrogation, subject to protection against self-incrimination, is properly the official himself. We go for information "to those who best can give it and who are most interested in not doing so";⁴⁹ consequently, said Roger Sherman in 1789, "we must get it out of this officer," the Secretary of the Treasury.⁵⁰ It needs therefore to be asked: (a) whether historically executive officers could be summoned by legislative investigators of executive conduct, and (b) what limits, if any, were placed upon inquiries addressed to them.

A. *English and Colonial Precedents*

In 1624, Sir Francis Bacon, who knew something of government at first hand as Solicitor General and Attorney General and later Lord Chancellor, pungently summarized the parliamentary practice of examining into executive conduct. "Congratulating the Treasurer on his advancement," Bacon declared that "he had one rule for all great officers of the Crown: 'Remember, a Parliament will come.'"⁵¹ Bowen remarks on:

Parliament's extraordinary zeal [during this period] in searching out corruption of government and trade. Between March and June, 1621, monopolies and briberies were beaten upon the anvil every day. . . . President Judge Bennet of the High Commission was found guilty, Attorney General Yelverton . . . Fleet Warden Harris . . . 'I am ashamed,' [King] James told Parliament, 'and it makes my hair stand upright.'⁵²

A few examples must suffice to illustrate the English and colonial practices of summoning executive officers.⁵³ Landis tells us that "in 1604 *Sir Francis Godwin's Case*, the following entry [House of Commons] is to be found: 'Power given in that case to send for an Officer, and to view and search any Record or other

⁴⁹ *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950); *McGrain v. Daugherty*, 273 U.S. 135, 163 (1927).

⁵⁰ See text accompanying note 86 *infra*. For a similar expression in the First Congress by Mr. Ames, see note 86 *infra*.

⁵¹ BOWEN 462.

⁵² *Id.* at 435.

⁵³ These practices are more fully documented by Potts and by Landis. See TAYLOR 61, where the author justly calls these works "formidable historical analyses of the investigative power." A canvass of more recent colonial studies, which are not directed to this issue, turned up no additional examples. Further colonial research might prove rewarding.

thing of that kind. . . .'⁵⁴ An early parliamentary inquiry (1666) into whether appropriated funds had been expended for authorized purposes is found in the authorization of a committee "to inspect the several *Accounts of the Officers* of the Navy, Ordnance, and Stores," and to send for persons and papers.⁵⁵ Compare the 1729 investigation of prison administration and the authorization "to examine any Persons, they shall think fit. . . ."⁵⁶ Such practices were boldly summarized in the course of the debate which preceded the Walpole inquiry and with which, as will appear, Jefferson was familiar.

When Walpole fell from power in 1742, his opponents in the Commons moved for a committee to investigate his conduct throughout the previous two decades.⁵⁷ Lord Limerick said that no duty of the House was more important "than that of inquiring strictly and impartially into the Conduct of those who are intrusted by the King with the executive Part of our Government."⁵⁸ The times were stormy; England was at war with Spain; the opposition rattled the bones of disrupted continental alliances; they raised the dread spectre of civil war; and they played a tattoo on the multitudinous dangers that would flow from a parliamentary inquiry.⁵⁹ But to no avail. Member after member spoke for the right and the duty to inquire into the conduct of the administration and its ministers "from the lowest to the highest."⁶⁰ Said one, "shall there be the least Suspicion of Mismanagement, and a *British House of Commons* not inquire into it?"⁶¹ Opposition to the inquiry was not based on a denial of the power but on injudicious timing,⁶² and an opposition spokesman confirmed that no man would deny that "we have a Right to inquire into the Conduct of our publick affairs."⁶³ That this right included the power to bring executive officers themselves before the House is illustrated by the examination of Nicholas Paxton,

⁵⁴ Landis 160, citing HALE, ORIGINAL INSTITUTION, POWER AND JURISDICTION OF PARLIAMENTS 105 (1707).

⁵⁵ 8 Comm. Jour. 628 (1666), cited by Landis 161. Again, "dissatisfaction with the conduct of the war in Ireland led on June 1, 1689, to the creation of a committee 'to inquire who has been the occasion of the Delays in sending Relief over to Ireland, and particularly to Londonderry.'" Landis 162.

⁵⁶ *Id.* at 163. The rejection of parliamentary precedent as "judicial" in *Kilbourn v. Thompson*, 103 U.S. 168 (1881), has been shown to be unhistorical. Landis 159-60; Potts 692-96. *United States v. Rumely*, 345 U.S. 41, 46 (1953), notes this criticism and remarks upon the "inroads" made by *McGrain v. Daugherty*, 373 U.S. 135 (1927), upon *Kilbourn v. Thompson*.

⁵⁷ 13 CHANDLER 139.

⁵⁸ *Ibid.*

⁵⁹ *Id.* at 82, 86, 89, 99, 154, 195.

⁶⁰ *Id.* at 157, 93, 94, 96, 101, 139-40, 150, 158, 161, 210.

⁶¹ *Id.* at 149.

⁶² *Id.* at 161, 192, 195.

⁶³ *Id.* at 161. For a similar concession by Horatio Walpole, son of Robert Walpole, see *id.* at 195.

Solicitor of the Treasury, who refused to testify on the ground that he should not be compelled to "accuse" himself, and was thereupon imprisoned.⁶⁴ The twenty-year proposal was defeated but the House then instituted an inquiry limited to the prior ten years.⁶⁵ It was in the midst of this debate that the elder William Pitt, after pointing to the historical precedents, summed up the matter: "We are called the Grand Inquest of the Nation, and as such it is our Duty to inquire into every Step of public Management, either Abroad or at Home, in order to see that nothing has been done amiss."⁶⁶

Understandably, colonial practices reflected this background. After studying colonial examples, Potts concluded that "the colonial assemblies like the House of Commons, very early assumed, usually without question, the right to investigate the conduct of the other departments of the government . . ."⁶⁷ Among the examples he cited were the inquiry in 1722 by the Massachusetts House of Representatives into the failure of Colonel Walton and Major Moody to carry out certain operations in the field, resting on its duty "to demand of any Officer in the pay and service of this government an account of his Management while in the Public Employ."⁶⁸ Another was the action of the Pennsylvania Legislature in 1770 when it

⁶⁴ *Id.* at 224-25; Committee Rept. pp. 2-3, appearing in *id.*

⁶⁵ *Id.* at 182, 189, 216.

⁶⁶ *Id.* at 172. The House was reminded of a prior inquiry by a "famous committee" of which Sir R. Walpole was himself chairman. *Id.* at 103. Note too a prior inquiry into "the Conduct of the Lord Commissioners of our Admiralty," who were censured and then deprived of the "Direction of that Branch of the publick Business." *Id.* at 208.

That the House was the "Grand Inquest" had been earlier asserted by Coke, 4 Inst. 11, and was confirmed by Justice Coleridge in *Howard v. Gossett*, 10 Q.B. 359, 379-80, 116 Eng. Rep. 139, 147 (1845): "That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit: . . . it would be difficult to define any limits by which the subject matter of their inquiry can be bounded. . . . I would be content to state that they may inquire into everything which concerns the public weal for them to know; and *they themselves, I think, are entrusted with the determination* of what falls within that category." (Emphasis added.) This was in essence repeated on appeal in *Gossett v. Howard*, 10 Q.B. 411, 451, 116 Eng. Rep. 158 (1845).

There appeared to be no judicial limitations in England on the broad power of inquiry and commitment. When the Lord Mayor of London was committed by the House of Commons to the Tower of London for contempt, the court held that it "hath no cognizance of contempts and breaches of privileges of the House of Commons: they are the only judges of their own privileges." *Case of Brass Crosby*, 3 Wilson 188, 203, 95 Eng. Rep. 1005-13 (K.B. 1771). See also *id.* at 199, 204, 95 Eng. Rep. at 1010, 1013. Parliamentary commitments for contempt remain immune from judicial interference. *Burdett v. Abbott*, 14 East 1, 149, 104 Eng. Rep. 501, 558 (K.B. 1811), *aff'd*, 5 Dow 165, 200-02, 3 Eng. Rep. 1289, 1302 (H.L. 1817); *Fielding v. Thomas*, [1896] A.C. 600, 609; *Stockdale v. Hansard*, L.R. 9 Ad. & E. 1, 169, 223-24, 232, 112 Eng. Rep. 1112, 1176, 1195-96, 1199 (Q.B. 1839); *Gossett v. Howard*, 10 Q.B. 411, 451, 116 Eng. Rep. 158, 172 (1945); *May* 93.

⁶⁷ Potts 708.

⁶⁸ *Ibid.*

"ordered the assessors and collectors of Lancaster County to appear before the audit committee and to bring with them their books and records for the preceding ten years."⁶⁹ Such practices found specific expression in the Maryland Constitution of 1776, which by Article X empowered the house to "call for all public or official papers and records, and send for persons, whom they may judge necessary in the course of inquiries concerning affairs relating to the public interest. . . ."⁷⁰ And Taylor concurs with Potts that "similar powers were exercised quite as freely, and without objection, in the states with constitutions which were silent on the subject."⁷¹

Finally, the Continental Congress, in creating a Department of Foreign Affairs presided over by a Secretary, provided that "any member of Congress shall have access [to 'all . . . papers of his office']: provided that no copy shall be taken of matters of a secret nature without the special leave of Congress."⁷² Here we have a clear reflection of British and colonial practices, demonstrating that not even "secret" matters pertaining to foreign affairs could be withheld from the legislature.

Far from being restricted to eliciting information from private persons, colonial history thus evinces a sweeping power to inquire into executive management and the application of public funds, to inquire into official conduct of the officials themselves and to require them to appear. *McGrain v. Daugherty* summarized this history as follows:

The power of inquiry—with power to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified.⁷³

Against this background it is idle to dwell interminably on the separation of powers.⁷⁴ Even Montesquieu, the Great Cham of separation, declared that the legislature should "have the means

⁶⁹ *Id.* at 709. For still another instance where "the Pennsylvania body asserted its right to investigate a public official," see *id.* at 710-12.

⁷⁰ *Id.* at 714.

⁷¹ TAYLOR 12; Potts 713, 715.

⁷² Wolkinson 328. (Emphasis added.)

⁷³ 273 U.S. at 174. This was deemed of such importance as to be reemphasized: "In that period ['Before and when the Constitution was framed and adopted'] the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative functions to the two houses are intended to include this attribute to the end that the function may be effectively exercised." *Id.* at 175.

⁷⁴ Younger *Passim*; Att'y Gen. memo. 3, 45-46; Kramer & Marcuse 906.

of examining in what manner its laws have been executed' by government officials."⁷⁵ What underlies that separation is not to be discovered by resort to pure logic⁷⁶ but by turning to history.⁷⁷ History delineates a virtually unlimited legislative power to demand information from the executive branch. And if history, traditionally the index of constitutional construction, is to be our guide, it may be concluded that the federal executive power came into being subject to the established power of the legislature to demand information. It cannot therefore constitute an invasion of the traditional executive powers to demand information which Parliament and colonial legislatures had long been accustomed to require.

B. *Early Congressional Precedents*

Were confirmation of the investigatory power needed, we have the practical construction of the legislative power by the First Congress,⁷⁸ forcibly expressed in a little noticed statute, the Act of September 2, 1789:

[I]t shall be the duty of the Secretary of the Treasury . . . to make report, and give information to either branch of the legislature in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office. . . .⁷⁹

This provision was drafted by Alexander Hamilton himself, and whether or not he hoped that this "sweeping mandate . . . wholly without limitation" would "fasten onto every conceivable activity of the Administration"⁸⁰ he yet knew well enough whether a duty to give information to either branch could be constitutionally imposed. Note that this statute makes no provision for executive dis-

⁷⁵ TAYLOR 50.

⁷⁶ For example, Kramer and Marcuse argue that: "The same logic which holds that Congress has the power to investigate so that it may effectively exercise its legislative functions, supports the proposition that the President has the power to withhold information when use of the power is necessary to exercise his Executive powers effectively." Kramer & Marcuse 899. The Supreme Court did not derive the legislative power of inquiry from "logic" but from history. See notes 45 and 73 *supra*. Where is the historical evidence that the power to withhold was an "attribute" of executive power? In *Anderson v. Dunn*, 6 Wheat (19 U.S.) 204, 233-34 (1821), the Court met the argument that to imply a contempt power for the legislature is to make possible a similar executive claim by saying "neither analogy nor precedent would support the assertion of such powers in any other than a legislative or judicial body."

⁷⁷ See note 10 *supra*.

⁷⁸ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), referring to early investigations.

⁷⁹ 1 Stat. 65-66 (1789) (now 5 U.S.C. § 242 (Supp. V, 1959-1963)). (Emphasis added.)

⁸⁰ KOENIG 58.

cretion to withhold. Not only was this a constitutional interpretation by the First Congress, of which Chief Justice Taft said that its "constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument,"⁸¹ but it had the approval of President Washington.

The debate on this measure, in which James Madison and Roger Sherman, members of the Constitutional Convention, participated, picks up much that earlier history had made familiar. As originally proposed, the bill made it the duty of the Secretary to "digest and *report plans* for the improvement and management of the revenue and support of the public credit."⁸² The right of Congress to *require* information was repeatedly recognized;⁸³ but opponents of the proposed duty to "report plans" strongly objected that it would give rise to an executive invasion of the House's exclusive prerogative to originate revenue matters, "an interference of the executive with the legislative powers."⁸⁴ Objection was made to creation of "a legal right in an officer to *obtrude* his sentiments perpetually on this body."⁸⁵ But the need for information was stressed, among others, by Roger Sherman: "[A]s we want information to act upon, we must procure it where it is to be had, consequently we must get it out of this officer, and the best way of doing so must be by making it his duty to bring it forward."⁸⁶ Noting that "no gentlemen . . . had objected to his [the Secretary] preparing a plan, and giving it *when it was called for*," Mr. Fitzsimons

⁸¹ *Myers v. United States*, 272 U.S. 52, 174-75 (1926). For the effect to be given this act see note 186 *infra*. Further executive recognition of this legislative power is illustrated by Vice-President Calhoun's request to the House in 1826, to investigate charges against his prior administration of the War Department as "the grand inquest of the nation," saying that "the conduct of public servants is a fair subject of the closest scrutiny . . ." 3 HINDS 97. Compare the invitation issued by Secretary of the Treasury Wolcott in 1800, Landis 171, and that of Secretary of War Crawford in 1850, *id.* at 184.

⁸² 1 ANNALS OF CONG. 615 (1789-1791). (Emphasis added.)

⁸³ See, e.g., remarks of Roger Sherman, accompanying note 86 *infra*; 1 ANNALS OF CONG. 619, 628, 630 (1789-1791).

⁸⁴ *Id.* at 616-18, 621. As Mr. Gerry put it: "Do gentlemen . . . consider the importance of the power they give the officer by the clause? Is it not part of our legislative authority? And does not the Constitution expressly declare that the House solely shall exercise the power of originating revenue bills? Now what is meant by reporting plans? It surely includes the idea of originating money bills . . ." *Id.* at 625.

⁸⁵ *Id.* at 624. (Emphasis added.) Mr. Tucker recapitulated: "However useful it may be to obtain information from this officer, I am by no means for making it a *matter of right* in him to *intrude* his advice." *Id.* at 630. (Emphasis added.)

⁸⁶ *Id.* at 631. Mr. Ames had earlier said: "The Secretary is presumed to acquire the best knowledge of the subject of finance of any member of the community. Now, if this House is to act on the best knowledge of circumstances, it seems to follow logically, that the House must obtain evidence from that officer . . ." *Id.* at 619.

suggested that "harmony might be restored . . . by changing the word report into prepare," and he so moved.⁸⁷ His motion was "carried by a great majority."⁸⁸

This history in part explains the omissions of similar "information" provisions from the contemporary acts setting up the Department of Foreign Affairs,⁸⁹ before long converted to the Department of State,⁹⁰ and the Department of War.⁹¹ The "planning" problem was not mooted in setting up those departments and they were established in the most casual manner imaginable,⁹² without discussion but for the "removability" problem in Foreign Affairs. In contrast, Mr. Ames said, "the present situation of our *finances* . . . presents . . . a deep, dark and dreary chaos. . . . It is with an intention to let a little sunshine into the business that the present arrangement is proposed."⁹³ It was the felt need for *planning* to cope with *these* problems by a "clear and capacious" mind⁹⁴ that was the source of the original mandatory submission of "report plans," later reduced, because of violent objection to executive "intrusion," to the familiar call for information when required. Hence the acts setting up the War and Foreign Affairs Departments do not lend themselves to a congressional disclaimer of power to require information.

But Attorney General Rogers experiences no difficulty on this score; indeed, he states:

One of the most powerful arguments to be found anywhere for the right of the President and the heads of departments to withhold confidential papers . . . in their discretion . . . is contained in the history dealing with the creation of the Department of Foreign Affairs by the Continental Congress, in 1782.⁹⁵

⁸⁷ *Id.* at 628. (Emphasis added.)

⁸⁸ *Id.* at 631.

⁸⁹ 1 Stat. 28 (1789).

⁹⁰ 1 Stat. 68 (1789) (Enacted Sept. 15, 1789).

⁹¹ 1 Stat. 49 (1789) (Enacted Aug. 7, 1789).

⁹² *Cf.* 1 ANNALS OF CONG. 630 (1789-1791). An illuminating glimpse is afforded by the fact that when the name of the Department was changed about six weeks after its creation from Foreign Affairs to State, its duties were expanded to include the publication of enacted laws, keeping the Great Seal and affixing it to commissions of all civil officers. 1 Stat. 68 (1789). Again, the debate on the bill establishing the Department of War occupies less than a page, without any mention of information. 1 ANNALS OF CONG. 615 (1789-1791).

⁹³ *Id.* at 619-20. (Emphasis added.) Mr. Gerry said that he was "in favor of the object of the clause; that was, to get all the information possible for the purpose of improving the revenue, because he thought this information would be much required, if he judged from the load of the public debt, and the present inability of the people to contribute largely to its reduction." *Id.* at 624.

⁹⁴ *Id.* at 619.

⁹⁵ Att'y Gen. Memo. 140.

Under that Congress, he properly states, "every Member thereof was entitled to see anything he wanted to see in the records of that Department."⁹⁶ And because some members of the Continental Congress were later members of the First Congress, he concludes that:

The Members who sat in the New Congress in 1789 could not have been unfamiliar with the fact that during the existence of the Continental Congress its Members had been entitled to see all kinds of secret data. The conclusion is therefore inescapable that the founders of our Government, and those who sat in the First Congress, meant to give no power to the Congress to see secret data in the executive departments against the wishes of the President. That was a power which the Continental Congress had and which the framers of the Constitution meant for the new Congress, created by the Constitution, not to have.⁹⁷

This "powerful argument" and its "inescapable conclusion" simply will not stand up.

The stormy debate which swirled about the proposed Department of Foreign Affairs, and which dragged on for days and days,⁹⁸ was exclusively devoted to a clause which would make the Secretary "removable from office by the President." Not a single word was uttered about the congressional right to require information, secret or otherwise.⁹⁹ From this the Attorney General might with equal plausibility have concluded that the right to require information had gone by default. But such an argument was precluded by the debate on the Department of the Treasury, during which it was generally agreed that "information," as contrasted with the "intrusive" submission of plans could be required of the Secretary, as Roger Sherman had categorically asserted.¹⁰⁰ And the ensuing Act of September 2, 1789, required information without any qualification whatsoever. The Attorney General's attempt to read an *exception* for "secret data" into this plain statutory provision, for so his argument must be tested, not only labors under the burden that such attempts must carry, but can be effectively countered. There was no need to single out for special mention "secret data" from other information which Congress felt empowered to "require," because the plenary parliamentary and colonial legislative power—but for the

⁹⁶ *Ibid.* For the Continental Congress provision, see text accompanying note 72 *supra*.

⁹⁷ Att'y Gen. Memo. 141.

⁹⁸ 1 ANNALS OF CONG. 473-672 (1789-1791).

⁹⁹ Mr. Wolkinson, whose articles the Attorney General adopted almost *in haec verba*, himself tells us that he was unable "to find any reference to that [Continental Congress] provision in the debate in the New Congress on the Act creating the Department of Foreign Affairs." Wolkinson 329-30.

¹⁰⁰ See text accompanying note 86 *supra*.

limited recalcitrance of George the Second during the Walpole inquiry, which had "greatly surprized" the Select Committee,¹⁰¹ and which was repudiated by the very Continental Congress provision upon which Attorney General Rogers relies—had never been questioned, so far as present day scholarship has disclosed.

Why indeed should former members of the Continental Congress have become more trusting with a new Department set up in a separate executive branch than with the old over which they had plenary control? The relations of the Continental Congress with the Secretary of the Department of Foreign Affairs, by the Attorney General's own testimony, closely resembled the intimate relations of Parliament with its ministers,¹⁰² and it yet jealously insisted on access to all "secrets" in that Department. The First Congress was not intent on surrendering cherished prerogatives to the newly created executive branch; on the contrary, the 1789 debate on the new Department is rife with distrust of the President and the new department heads.¹⁰³ Moreover, the members of the 1789 Congress who had been members of the Continental Congress had earlier had access to all the information involved in the delicate treaty making with France, Holland and England. Such access militates strongly against the argument that they would by default endorse the notion that executive insulation of "secret" papers from the Congress was indispensable to the conduct of foreign affairs.

Any doubts that may cling to the omission of "information" provisions from the War Department and Foreign Affairs statutes, however, are set to rest by the advice Attorney General Cushing furnished in 1854 to the President:

By express provision of law, it is made the duty of the Secretary of the Treasury to communicate information to either House of Congress when desired; and it is practically and by legal implication the same with the other secretaries, and with the Postmaster and the Attorney General.¹⁰⁴

¹⁰¹ For a discussion of this incident, see text accompanying notes 205-10 *infra*.

¹⁰² Att'y Gen. Mem. 140-41.

¹⁰³ For the First Congress' suspicion of executive "intrusion," see text accompanying note 85 *supra*. Note also Gerry's remark: "If the doctrine of having prime and great ministers of state was once well established, he did not doubt but we should soon see them distinguished by a green or red ribbon, or other insignia of court favor and patronage." 1 ANNALS OF CONG. 624 (1789-1791). See also *id.* at 617. Cf. note 84 *supra*.

¹⁰⁴ 6 OPS. ATT'Y GEN. 326, 333 (1856). Both Wolkinson 247-48, and Attorney General Rogers, Att'y Gen. Memo. 48, quote in identical terms another Cushing extract of similar import, *i.e.*, that the Treasury statute, subjecting the Secretary to "direct calls for information," "has come, by analogy or by usage, to be considered a

"Congress," summed up Cushing, "may at all times call on them [the Departments] for information or explanation in matters of official duty. . . ."¹⁰⁵ In light of the foregoing, Attorney General Rogers' statement in 1958 that "the Executive privilege . . . could be traced back to section 2 of the Act of July 27, 1789, 1 Stat. 28, establishing the Department of Foreign Affairs"¹⁰⁶ is without merit.

The authoritative constitutional construction of "legislative power" by President and Congress embodied in the Act of 1789, which made it the "duty" of the Secretary of the Treasury to furnish information required by Congress, is the earliest illustration of the fact that both Houses, as the Supreme Court remarked, "early in their history" took the broad, colonial view of their power to inquire.¹⁰⁷ Throughout the first hundred years of our history there was a constant stream of investigations of the civil and military operations of the executive branch.¹⁰⁸ The instances are far too

part of their [the other Department's] official business." 6 OPS. ATT'Y GEN. at 332. Nonetheless, they conclude on the basis of Cushing's statement that "no Head of Department can lawfully perform an *official* act against the will of the President . . . [otherwise] Congress might by statute so divide and transfer the executive power as utterly to subvert the Government . . .," 7 OPS. ATT'Y GEN. 469-70 (1856), and, premising a "suppositious" law which would compel department heads to furnish information to Congress, leaving no discretion to withhold in the President, that: "According to Attorney General Cushing, such a law might well be subversive of our form of Government. . . ." Wolkinson 249; Att'y Gen. Memo. 48. That Cushing recognized the constitutionality of the 1789 law requiring the Treasury to furnish information, without any reservation for "discretion" is implicit in the quotation in the text accompanying notes 104-05 *supra*. Moreover, Cushing stated in the same opinion that: "To coerce the Head of the Department is to coerce the President. *This can be accomplished* in no other way but *by a law*, constitutional in its nature, enacted in accordance with the forms of the Constitution." Quoted by Wolkinson 252; Att'y Gen. Memo. 51.

¹⁰⁵ 6 OPS. ATT'Y GEN. 344 (1856).

¹⁰⁶ Paraphrased by Kramer & Marcuse 895 n.772.

¹⁰⁷ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

¹⁰⁸ TAYLOR 33. From the outset, members of Congress insisted that "an inquiry into the expenditure of all public money was the indispensable duty of this House." 3 ANNALS OF CONG. 491 (1792). Mr. Randolph, in proposing the investigation of the War Department in 1809, put the matter sharply: "Among the duties—and among the rights, too—of this House, there is perhaps none so important as the control which it constitutionally possesses over the public purse. To what purpose is that control? The mere form of appropriating public money, unless this House rigorously examine into the application of the money thus appropriated; unless the House examine . . . if it be misapplied, that is, if money appropriated for one object be expended for another; unless we do this, sir, our control over the public purse is a mere name—an empty shadow." 19 ANNALS OF CONG. 1330-31 (1809).

Congressman Macon said in 1810: "[T]he right to inquire into the state of the whole Army unquestionably gave the right to inquire into the conduct of the individuals composing it." 21 ANNALS OF CONG. 1748 (1810). In sum, the "power of inquiry has been employed by Congress throughout our whole history . . . in determining what

numerous to chronicle here, and such investigations have continued uninterruptedly down to the present day.¹⁰⁹ The Attorney General himself noted that the executive branch has failed to comply with Congressional demands for information in "relatively few instances."¹¹⁰ Because Congress did not clap such recusants in the Capitol guardroom or run to the courts, Attorney General Rogers has spelled out "150 years of legislative acquiescence" in the assertion of executive power to withhold information from Congress.¹¹¹ It is a strange logic that would deduce from 175 years of persistent congressional demands for information and almost unflinching exhortation of executive refusals to furnish it¹¹² an "acquiescence" in the withholding. Moreover, if the legislative power conferred by the Constitution indeed reflected parliamentary and colonial usage, as the Act of 1789 immediately demonstrated afresh, then subsequent "acquiescence" in resistance to its exercise is of no moment, for a constitutional power, as in the case of a statutory authority, "cannot evaporate through lack of . . . exercise."¹¹³ But such "acquiescence" is in fact a figment of the executive imagination.

to appropriate . . . or whether to appropriate. The scope of the power to inquiry, in short, is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

¹⁰⁹ To cite only a few early examples, the House "scrutinized the Treasury Department (1800 and 1824), the territorial government of Mississippi (1800); the War Department (1809 and 1832); the conduct of General James Wilkinson (1810); government 'clerks' generally (1818), the Post Office (1820 and 1822), the Bank of the United States (1832 and 1834), the New York Customs House (1839), the conduct of Captain J. D. Elliot commanding a naval squadron in the Mediterranean (1839), the Commissioner of Indian Affairs (1849), the Secretary of the Interior (1850); the Smithsonian Institution (1855). In the meantime the Senate had looked into General Andrew Jackson's conduct of the Seminole Wars in Florida (1818), the Internal Revenue Bureau (1828), the Post Office (1830), and John Brown's raid at Harper's Ferry (1859)." TAYLOR 33-34. See also Potts 813-14, and a list compiled by Senator Edmunds in 1886, 17 CONG. REC. 2216 *et seq.* (1886). It is now beyond dispute that the "power of Congress to conduct investigations is inherent in the legislative process. . . . It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Watkins v. United States*, 354 U.S. 178, 187 (1957).

¹¹⁰ Att'y Gen. Memo. 2.

¹¹¹ *Id.* at 71.

¹¹² See, e.g., Senator Edmunds' (chairman of the Senate Judiciary Committee) reply to President Cleveland in 1886. COLLINS 569-73. *Cf.* the House Report filed in 1843 after President Tyler furnished the desired information, accompanied by a claim of power to withhold. 3 HINDS 181-86.

¹¹³ *FTC v. Bunte Bros.*, 312 U.S. 349, 352 (1941). See *United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950). In the Jay Treaty debate (1796), Mr. Havens "laid it down as an incontrovertible maxim, that neither of the branches of the Government could, rightfully or constitutionally, divest itself of any powers . . . by a neglect to exercise those powers that were granted to it by the Constitution." 5 ANNALS OF CONG. 486 (1796). To the same effect, see the statement of Mr. Nicholas, *id.* at 447.

II. THE "EXECUTIVE POWER" CONTAINS NO HISTORICAL LIMITATIONS ON LEGISLATIVE INQUIRY

Attorney General Rogers builds his fortress on the executive power, the argument being that the Constitution vests the executive power in the President and directs him to "take care that the laws be faithfully executed." Since he "is supreme in the duties assigned to him by the Constitution," the argument runs, Congress cannot "compel heads of departments by law to give up papers and information involved" if the President concludes they should be withheld.¹¹⁴ The Congress, however, is equally "supreme in the duties assigned to [it] by the Constitution," preeminent among which is the established power to investigate into executive conduct; and, in light of history it might be argued with greater force that the executive cannot withhold that which Congress is authorized to require. The Attorney General does not address himself to the accommodation of the two powers but rather assumes that some special attribute of the executive power gives the executive the last word.¹¹⁵

If the executive power runs no further than the power to execute the laws, the claim of "uncontrolled discretion" to withhold information is truly in an awkward posture for it posits that effective execution of the laws requires that Congress be kept in the dark as to how its laws are being executed. Without details of performance a congressional determination whether to transfer, alter or abolish delegated functions is impeded; without such information inquiry into "corruption, inefficiency or waste" is shackled. There is not the slightest historical warrant to conclude that by conferring the power to execute the laws the framers intended the executive to limit legislative exercise of those established functions in order to shield executive conduct from traditional legislative inquiries.

No mention of the secrecy issue is to be found in the history of the executive power, but revealing light on the pre-1789 attitude toward governmental secrecy is shed by the history of Article I, section 5(3), of the Constitution which required Congress to keep and publish Journals, except "such parts as may in their [each House] judgment require secrecy." The lively fears that were stirred when the issue was brought into the open by an *express* grant to the legislature, then more trusted than the executive,¹¹⁶ and the narrow

¹¹⁴ Att'y Gen. Memo. 3-4. See also *id.* at 46. This view is adopted by Kramer & Marcuse 899-903.

¹¹⁵ *Id.* at 898-902.

¹¹⁶ See text accompanying notes 132-40 *infra*.

reading whereby proponents sought to allay such fears, repel the inference that the Framers intended by implication to give the executive the limitless power that was withheld from the Congress.

The Article I provision was first voted by the Federal Convention by a very narrow margin after James Wilson's vigorous objection: "The people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings."¹¹⁷ Later, when George Mason and Gerry pressed for publication of "all the proceedings of the House," the "other side" countered that "cases might arise where secrecy might be necessary in both Houses—Measures preparatory to a declaration of war. . . ."¹¹⁸

Such fears and the attempts to quiet them by restrictive readings were echoed in the Ratification Conventions. In Virginia, Patrick Henry demanded an explanation "why Congress should keep their proceedings secret," and opined that "the liberties of a people never were . . . secure when the transactions of their rulers may be concealed from them." He recognized the need for temporary withholding of "such transaction as relate to military operations or affairs of great consequence, the immediate promulgation of which might defeat the interests of the country." And he concluded that to "cover with the veil of secrecy the common routine of business, is an abomination. . . ."¹¹⁹ George Mason also argued that the provision "enables them to keep the negotiations about treaties secret. Under this veil they may conceal anything and everything."¹²⁰ To set such fears at rest, John Marshall referred to the British practice invoked by Patrick Henry and asked:

When debating on the propriety of declaring war, or on military arrangements, do they deliberate in the open fields? No sir. . . . In this plan, secrecy is only used when it would be fatal and pernicious to publish the schemes of government.¹²¹

Not satisfied, Mason continued to press, "why not insert words that would exclude ambiguity and danger?"¹²²

In the North Carolina Ratification Convention, Davie, a member of the Federal Convention, explained that under the provision

¹¹⁷ 2 FARRAND, RECORDS 260.

¹¹⁸ *Id.* at 613.

¹¹⁹ 3 ELLIOT'S DEBATES 170 (2d ed. 1941).

¹²⁰ *Id.* at 404. This was not a fleeting reaction. In 1846 President Polk wrote the House that: "I am fully aware of the strong and correct feeling which exists throughout the country against secrecy of any kind in the administration of the Government. . . ." 4 RICHARDSON 434.

¹²¹ 3 ELLIOT, *op. cit.* *supra* note 119, at 233, 170, 222.

¹²² *Id.* at 404.

"they would conceal nothing, but what is would be unsafe to publish."¹²³ And Iredell added that:

In time of war it was absolutely necessary to conceal the operations of government; otherwise no attack on an enemy could be premeditated with success . . . that it was no less imprudent to divulge our negotiations with foreign powers. . . .¹²⁴

These remarks testify to the apprehension that was generated by an express legislative authorization to conceal information from the public. In light of the denial to the representative body of limitless power to conceal, how can an intention be derived to grant by implication to the executive branch power to keep "anything and everything" secret? Indeed, what might momentarily be concealed from the public *had* to be divulged to Congress if that partner in government was to participate in making the momentous decisions which alone were to be temporarily concealed.

In the interest of completeness it is necessary to inquire whether the executive power extends beyond the power of faithful execution of the laws. There is no dissent from the early identification of the legislative power of inquiry with that of the parliamentary Grand Inquest.¹²⁵ In contrast, both the framers of the state constitutions and the records of the Constitutional Convention show an intention to cut the executive off from the prerogatives of the Crown and to limit its power.¹²⁶ Kramer and Marcuse invoke the Founding Father's fear of "despotic tendencies of the legislature," of legislative "tyranny," but that darkens counsel.¹²⁷ So, Madison's statement that "the legislative department is everywhere . . . drawing all power into its impetuous vortex . . ."¹²⁸ merely had reference to the "danger from legislative usurpations . . . by assembling *all*

¹²³ 4 ELLIOT, *op. cit. supra* note 119, at 72.

¹²⁴ *Id.* at 73.

¹²⁵ William Pitt asserted the power of a Grand Inquest without contradiction, see text accompanying note 66 *supra*; it was recognized that this was a congressional power by Washington and his Cabinet, see text accompanying note 191 *infra*, by Vice-President Calhoun, see note 81 *supra*, and by President Polk, see note 281 *infra*. See also notes 201, 203 and 226 *infra*, and the discussion in the House during the Jay Treaty debate, at notes 251-53 *infra*.

¹²⁶ See text accompanying notes 142, 157-59 *infra*. See also notes 151 and 157 *infra*. Iredell explained to the North Carolina Ratification Convention that: "It was very difficult, immediately on our separation from Great Britain, to disengage ourselves entirely from ideas of government we had been used to." 4 ELLIOT, *op. cit. supra* note 119, at 108. But referring to the maxim that "the King can do no wrong," Iredell said that a departure from the royal prerogative was made because "we have experienced that he can do wrong. . . ." *Id.* at 109. The very resort to "executive power" marked a step away from English law. See note 153 *infra*.

¹²⁷ Kramer & Marcuse 905.

¹²⁸ *Ibid.*

power in the same hands,"¹²⁹ which he had illustrated during the Constitutional Convention by reference to several states wherein "the Executives . . . are in general little more than Cyphers; the legislature omnipotent."¹³⁰ This was a plea for the strong executive fashioned by the framers, no more.¹³¹ From this follows no intention to curtail familiar legislative inquiry into executive conduct. Madison himself stated in *The Federalist No. 51* that "in republican government, the legislative authority necessarily predominates." And the "belief prevalent" at the end of the colonial period was that "'the executive magistracy' was the natural enemy, the legislative assembly the natural friend of liberty. . . ."¹³² It has survived in Mr. Justice Brandeis' well-known reference to the deep-seated

¹²⁹ THE FEDERALIST NO. 47. So, too, James Wilson's remark, Kramer & Marcuse 905, that the colonists "did not oppose the British King but the Parliament . . . a corrupt multitude," scarcely expresses Wilson's preference for the executive over the legislature, for he flatly rejected the monarchical "prerogative" and conceived of executive power as confined to "executing the laws." See text accompanying note 158 *infra*. See also note 151 *infra*. Jefferson explained that he opposed Hamiltonian measures in order "to preserve the Legislature pure and independent of the Executive . . . not to permit the Constitution to be construed into a monarchy. . . ." CORWIN 18.

When Kramer & Marcuse 905, quote Gouverneur Morris to the effect that the: "Executive magistrate should be the guardian of the people, even of the lower classes, against Legislative tyranny," and, to complete the quotation: "against the Great and the wealthy who in the course of things will necessarily compose the Legislative Body," 2 FARRAND, RECORDS 52, they could scarcely pick a poorer witness. It is of a piece with Morris' "frankly cynical contempt for 'democracy,'" for he ever feared the "domination of a riotous mob" and favored a "government in the hands of the rich and well-born," a "president elected for life, with power to appoint a Senate of life members," 7 DICTIONARY OF AMERICAN BIOGRAPHY 209, 211 (Malone ed. 1934), all for the protection of the "lower classes"!

¹³⁰ 2 FARRAND, RECORDS 35.

¹³¹ So, too, Jefferson's fear of a legislative despotism merely underscored that under the Virginia government, to which his words were directed: "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government." Kramer & Marcuse 905 n.801. (Emphasis added.) The power of congressional inquiry is not at all comparable to such "concentration."

¹³² CORWIN 5-6. An explanation was furnished in 1791 by Justice Wilson, one of the foremost Framers: before the Revolution, the executive powers were not derived from the people but from a "foreign source" and "were directed to foreign purposes"; hence, they were "objects of aversion and distrust." But "our assemblies were chosen by ourselves . . . Every power, which could be placed in them, was thought to be safely placed . . ." At the Revolution, "the same fond predilection, and the same jealous dislike, existed and prevailed. . . ." 1 WILSON, WORKS 398 (1804).

Mr. Davie, speaking for ratification of the Constitution before the North Carolina Convention, would have preferred to confide the treaty making power to the President alone, but explained "that jealousy of executive power which has shown itself so strongly in all the American governments, would not admit this improvement." 3 FARRAND, RECORDS 348.

Compare the state constitutional limitations on the executive collected by PATTERSON 82-91. See HURST, JUSTICE HOLMES 98; 2 PAGE SMITH 701, 695.

conviction of the English and American people that "they must look to representative assemblies for protection of their liberties."¹⁸³

The early state constitutions, with each of which one or more of the members of the Convention were familiar,¹⁸⁴ not only provided for "legislative supremacy," but generally limited the executive power.¹⁸⁵ The New York Constitution influenced the Committee on Detail more than any other;¹⁸⁶ it vested the "executive power" in a governor and then enumerated a set of powers, such as the power to reprieve and pardon, but lodged the veto and appointment power elsewhere.¹⁸⁷

The records of the Constitutional Convention on this point, though meager, are yet illuminating.¹⁸⁸ In a debate on the initial resolution it was determined "that a national Executive be [instituted] . . . to possess the executive powers of Congress. . . ."¹⁸⁹ Roger Sherman, arguing for appointment of the executive by the legislature, said that "he considered the Executive magistracy as nothing more than an instrument for carrying the will of the Legislature into effect. . . ."¹⁹⁰ Notwithstanding that James Wilson was "leader of the 'strong executive' party" and favored an executive "independent of the legislature,"¹⁹¹ he too declared that he "did not consider the Prerogative of the British Monarch as a proper guide in defining the Executive powers. . . . The only powers he conceived strictly Executive were those of executing the laws and appointing officers. . . ."¹⁹²

¹⁸³ *Myers v. United States*, 272 U.S. 52, 294-95 (1926) (dissenting opinion) (Holmes, J., concurring). More recently Mr. Justice Jackson expressed reluctance "further to aggrandize the presidential office, already so potent . . . at the expense of Congress." *Youngstown Sheet & Tube Co. v. United States*, 343 U.S. 579, 654 (1952) (concurring opinion).

¹⁸⁴ FARRAND, FRAMING 128-29; PATTERSON 82-83. Farrand remarks that members of the Federal convention "were dependent upon their experience under the State constitutions" and upon "what they themselves had seen and done." FARRAND, FRAMING 203-04. For a collection and analysis of state constitutional provisions, see PATTERSON 83-89.

¹⁸⁵ PATTERSON 89, 83-84. If "Legislative Supremacy" had come into disrepute, CORWIN, COURT OVER CONSTITUTION 24 (1938), executive discretion to withhold information was significantly missing from the numerous checks on Congress which were enumerated in the several Conventions. See, e.g., 2 ELLIOT'S DEBATES 166-69 (1941).

¹⁸⁶ FARRAND, FRAMING 129; PATTERSON 85.

¹⁸⁷ *Ibid.*

¹⁸⁸ Having examined the records of the Constitutional Convention on the issue whether the express enumeration excluded unenumerated executive powers, the writer concurs in the analysis of PATTERSON 92-97. The matter is hereinafter discussed.

¹⁸⁹ 1 FARRAND, RECORDS 64.

¹⁹⁰ *Id.* at 65.

¹⁹¹ CORWIN 11.

¹⁹² 1 FARRAND, RECORDS 65-66. See also Iredell's remarks to the North Carolina Ratification Convention, note 126 *supra*.

No one took exception to these remarks; instead the debate centered on whether the executive should be single or multiple. Madison thereupon emphasized that preliminarily it was essential "to fix the extent of the Executive authority . . . as certain powers were in their nature Executive, and *must be given* to that department"¹⁴³ Madison therefore did not consider that the mere creation of an executive gave rise to inherent powers but rather that they "must be given" to the executive. Accordingly he moved, being seconded by Wilson, the insertion after the words "that a national Executive ought to be instituted" of the phrase "*with power to carry into effect the national laws, to appoint to offices . . . and to execute such other powers as may from time to time be delegated by national Legislature.*"¹⁴⁴ Upon Pinckney's motion, this was amended by striking the words "to execute such other powers as may . . . be delegated" on the ground that "they were unnecessary, the object of them being included in the 'power to carry into effect the national laws.'"¹⁴⁵ Subsequently this was amended to read "with power to carry into execution the national laws" and a power of appointment was added.¹⁴⁶ So it remained, with the addition of a veto power,¹⁴⁷ and so it appeared in an enumeration by the Committee on Detail of "his powers," which then included command of the land and naval forces.¹⁴⁸

The phrase "the Executive Power of the United States shall be vested in a single person," the President, first appears in a James Wilson draft, accompanied by an enumeration of powers to grant reprieves and pardons, to serve as Commander in Chief, and with a Rutledge addition that "it shall be his duty to provide for the due and faithful execution of the Laws. . . ."¹⁴⁹ No explanation of the change from "power to carry into effect the national laws" to "Executive Power" appears; and it can hardly be assumed that James Wilson, who was chairman of the Committee on Detail,¹⁵⁰ and to whom the only conceivable executive powers were those of appointment and of "executing the laws," should have intended by

¹⁴³ 1 FARRAND, RECORDS 66-67. (Emphasis added.)

¹⁴⁴ *Id.* at 67. (Emphasis added.)

¹⁴⁵ *Ibid.*

¹⁴⁶ 2 FARRAND, RECORDS 121.

¹⁴⁷ *Id.* at 132, 146.

¹⁴⁸ *Id.* at 146.

¹⁴⁹ *Id.* at 163, 171. The report of the Committee on Detail changed the "faithful execution" phrase to "he shall take care that the laws of the United States be duly and faithfully executed." *Id.* at 185. It was referred in this form to the Committee on Style, *id.* at 572, 574, and that Committee shifted to: "The executive power shall be vested in a president of the United States of America . . . he shall take care that the laws be faithfully executed." *Id.* at 597, 600.

¹⁵⁰ CORWIN 11.

the change in phraseology to make a radical shift to unlimited executive powers. So to read "executive power" is to render meaningless the prior step-by-step expansion of carefully enumerated powers which was carried over into the final draft, and to overlook the prevalent fear of executive usurpation.¹⁵¹ Some explanation for such a reading is in order. It is not furnished by the fact that the Convention finally made the executive independent of the legislature by substituting election by electors for appointment by the legislature.¹⁵² Just as Madison separated the extent of the executive powers from the question whether the executive should be single or plural, so did James Wilson impliedly separate the extent of the executive's powers from his right to exercise those powers independently. A "strong executive," Wilson could accept, but with powers limited to the execution of the laws.¹⁵³ From the outset the executive powers were carefully enumerated and gradually expanded, and the final phrase was merely the formula for settlement of the controversy whether the executive power should be lodged in more than one person, first expressed in the phrase "the Executive Power . . . shall be vested in a single person," and then "the Executive Power shall be vested in a President. . . ."¹⁵⁴

The prevailing judicial view is expressed by Chief Justice Taft's statement in *Myers v. United States* that "the vesting of the executive power in the President was essentially a grant of the

¹⁵¹ In *THE FEDERALIST* No. 48, at 333 (Cooke ed. 1961) (Madison) Madison said that the "founders of our republics," i.e., the state constitution draftmen, "seem never for a moment to have turned their eyes from the danger to liberty from the over grown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations." This was a plea for a strong executive to balance an over strong legislature, but it was addressed to a lively fear of executive tyranny. See text accompanying note 132 *supra*.

¹⁵² FARRAND, RECORDS 169-70.

¹⁵³ See text accompanying notes 141-42 *supra*. In the Virginia Ratification Convention, Governor Randolph said: "What are his powers? To see the laws executed. Every executive in America has that power." 3 ELLIOT'S DEBATES 201 (1941). Charles Pinckney, a delegate to the Federal Convention, said in the South Carolina Ratification Convention that "we have . . . endeavored to infuse into this department that degree of vigor which will enable the President to execute the laws with energy and dispatch." 4 *id.* at 329. In the North Carolina Ratification Convention, Iredell said, "most of the Governors of the different states have powers similar to those of the President." 4 *id.* at 107. The governors' powers were quite limited. See text accompanying note 135 *supra*. Cf. 2 ELLIOT'S DEBATES 514 (1941), where Wilson twitted the opposition in the Pennsylvania Convention for stressing "the deficiency of powers in the President."

¹⁵⁴ "The records of the Constitutional Convention make it clear that the purposes of this clause were simply to settle the question whether the executive branch should be plural or single and to give the executive a title." Corwin, *The Steel Seizure Case* 53.

power to execute the laws."¹⁵⁵ But he went on to suggest a broader interpretation on several grounds, first reaching for analogy to powers of the Crown. Faced with the fact that in the 1776-1787 period "power to make appointments and removals had sometimes been lodged in the legislature or in the courts," he said that "such a disposition of it was really vesting part of the executive power in another branch of the Government," reasoning that:

In the British system, the Crown, which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words "executive power" as including both.¹⁵⁶

Nothing better illustrates the danger of attributing to our forebears views which may seem "natural" enough to us but which history shows were in fact alien to them. In the 1776-1787 constitutions of the various states, "'Executive power' . . . was left to legislative definition and was cut off entirely from the resources of the common law and of English constitutional usage."¹⁵⁷ James Wilson, leader of the "strong executive" contingent in the Convention, affirmed that "he did not consider the Prerogative of the British Monarch a proper guide in defining the Executive powers . . ."¹⁵⁸ and no voice was raised in opposition. Later, Chief Justice Taney, remarking on the "wide difference" between the Presidential and Crown powers, declared that "it would be altogether unsafe to reason from any supposed resemblance between them, . . . where the rights and powers of the executive . . . are brought into question."¹⁵⁹

Second, Chief Justice Taft stressed the significant difference between the grant of legislative power under Article I to Congress, which is limited to powers therein enumerated, and the more general grant of the executive power to the President under Article

¹⁵⁵ 272 U.S. 52, 117 (1926).

¹⁵⁶ *Id.* at 118.

¹⁵⁷ CORWIN 6.

The draftsmen of the federal Constitution did not of course jettison their state convention experience colored by limited executive power. To the contrary, "the state constitutions were continually drawn upon," and The Framers, "relied almost entirely upon what they themselves had seen and done . . . under the state constitutions and articles of confederation." FARRAND, FRAMING 128, 204.

Executive "as a noun was not then a word of art in English law—above all it was not so in reference to the Crown. It had become a word of art in American law through its employment in various state constitutions adopted from 1776 onward. . . . It reflected . . . the revolutionary response to the situation precipitated by the repudiation of the royal prerogative." Goebel, *Ex Parte Clio*, 54 COLUM. L. REV. 450, 474 (1954) (Review of CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953)).

¹⁵⁸ 1 FARRAND, RECORDS 65. See also Iredell's remark quoted, *supra* note 126.

¹⁵⁹ *Fleming v. Page*, 9 How. (50 U.S.) 602, 618 (1850).

II. . . ."¹⁶⁰ Viewed alone, this "difference" might suggest an intention to create an unlimited executive, in contrast to a limited legislative, power. But this does violence to the plainly expressed pre-constitutional preference for a strong legislature and a weak executive, and to the above-noticed origin of the "Executive Power" phrase. Of course, the Convention moved to a "strong executive," but to one of *enumerated* functions, and one further limited by the legislature in important particulars: treaties and certain appointments required Senate consent, and Congress was empowered to override the President's veto, thus being made the final arbiter of what laws are necessary. The "difference" in terminology between the grants of the legislative and the executive powers provides little support for the argument regarding an unlimited executive power.

Finally, Chief Justice Taft dismissed the specific enumeration of powers in Article II, saying that "the executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate. . . ."¹⁶¹ This is far removed from what "enumeration" meant to those who adopted the Constitution. In the Virginia Ratification Convention, Governor Randolph, defending the Constitution, said that the powers of government "are enumerated. Is it not, then, fairly deductible, that it has no power but what is expressly given it?—for if its powers were to be general, an enumeration would be needless."¹⁶² Mere "emphasis" fails to explain the cautious, step-by-step addition of one enumerated power and then another by the framers. If, said Mr. Justice Jackson, the executive power clause granted a plenary executive power, "it is difficult to see why the forefathers bothered to add several specific terms, including some trifling ones." He pointed to the express presidential authorization to "require the Opinion, in writing" of each department head, and justly concluded that "matters such as these would seem to be inherent in the Executive if anything is."¹⁶³

¹⁶⁰ *Myers v. United States*, 272 U.S. 52, 128 (1926).

¹⁶¹ *Id.* at 118.

¹⁶² 3 ELLIOT'S DEBATES 464 (1941). Similarly, Iredell told the North Carolina Convention with reference to Congress that: "It is necessary to *particularize* the powers intended to be given, in the Constitution, as having no existence before; but, after having *enumerated what we give up*. . . ." 4 *id.* at 179. (Emphasis added.)

¹⁶³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640-41 (1952) (Jackson, J., concurring). In his concurring opinion, Mr. Justice Douglas states that: "Article II which vests the 'executive power' in the President defines the power with particularity." *Id.* at 632. Justice Story said that "the powers with which it [the executive department] is intrusted" "are enumerated in the second and third sections" of Article II. 2 STORY 314. In *Ex parte Merryman*, 17 Fed. Cas. 144, 149 (No. 9487) (C. C. Md. 1861), Taney C. J., points out how "carefully" the framers "withheld from it [the executive branch] many of the powers belonging to the executive branch of the English government . . . and conferred [and that in clear and specific terms] those powers only which were deemed essential. . . ."

It is incongruous to attribute to a generation so in dread of executive tyranny an intention to give a newly created executive a blank check at the very moment when it was carefully enumerating the powers that were being granted, down to the veriest trifle.¹⁶⁴ Justly does Mr. Justice Jackson reject "the view that this [Executive Power] clause is a grant in bulk of all conceivable power but regard it as an allocation to the presidential office of the generic powers thereafter stated."¹⁶⁵ Not Taft's views but those of Mr. Justice Holmes have carried the day: "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws. . . ."¹⁶⁶ This was also the view of Mr. Justice Brandeis;¹⁶⁷ it has been adopted by Mr. Justice Frankfurter,¹⁶⁸ by Justices Black and Douglas,¹⁶⁹ and it is solidly anchored in history.

In the field of foreign relations a broader view may seem to be indicated by *United States v. Curtiss-Wright Export Corp.*¹⁷⁰ where it "was intimated that the President might act in external affairs without congressional authority. . . ."¹⁷¹ Mr. Justice Jackson has pointed out that "much of the Court's opinion is *dictum*" and that the case "involved, not the question of the President's power to act without congressional authorization, but the question of his right to act under and in accord with an Act of Congress."¹⁷² By what logic, it has been asked, does the President have "inherent power in foreign affairs but not in domestic?"¹⁷³ Perhaps a partial answer may lie in the need, given a cluster of constitutional riddles,¹⁷⁴ of filling a power vacuum. But time enough to formulate an answer in lieu of a *dictum* when that need becomes real.

In the constant stress on presidential powers, a *duty* tucked away in their midst has been insufficiently noticed: the duty "from time to time [to] give to the Congress information of the State of

¹⁶⁴ That the requirement of opinions was not then regarded as a "trifle" may be gathered from Iredell's elaborate explanation to the North Carolina convention why the power was granted. 4 ELLIOT'S DEBATES 108-10 (1941). His explanation of the grant of the pardoning power was even more extensive. *Id.* at 110-14. Time and again during the various convention debates the smoldering distrust of centralized power flared up.

¹⁶⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952).

¹⁶⁶ *Myers v. United States*, 272 U.S. 52, 177 (1928) (dissenting opinion).

¹⁶⁷ *Id.* at 192.

¹⁶⁸ In *Sawyer*, 343 U.S. at 610 (concurring opinion).

¹⁶⁹ *Id.* at 587. Mr. Justice Douglas said that: "The power to execute the laws starts and ends with the law Congress has enacted. *Id.* at 633 (concurring).

¹⁷⁰ 299 U.S. 304 (1936).

¹⁷¹ 343 U.S. at 635-36 n.2 (Jackson, J., concurring).

¹⁷² *Ibid.*

¹⁷³ PATTERSON 94.

¹⁷⁴ See CORWIN 4-5.

the Union." It has too mechanically been associated with annual presidential messages, but Justice Story properly read it more broadly. The President, he stated,

must possess more extensive sources of information, as well in regard to domestic as foreign affairs, than can belong to the Congress. The true workings of the laws . . . are more readily seen, and more constantly under the view of the executive. . . . There is great wisdom, therefore . . . in requiring the President to lay before Congress all facts and information which may assist their deliberations. . . .¹⁷⁵

This duty to supply "*all* facts and information" which the President has and the Congress has not and "which may assist their deliberations" is the obverse of the then familiar power of the Grand Inquest to inquire.¹⁷⁶ A good reason for a restrictive reading of the phrase has yet to be proffered, and it is contrary to common sense. It can no longer be doubted that Congress was empowered to investigate the conduct of the Executive Departments,¹⁷⁷ and it would be a self-defeating construction that would simultaneously endow the executive with "uncontrolled discretion" to withhold information needed for that purpose.¹⁷⁸ It is more reasonable to read the "state of the nation" phrase as imposing a duty to furnish information which the Grand Inquest was historically authorized to require.

It does not follow that the framers intended that "Congress would necessarily prevail in all cases" of a boundary dispute between the President and Congress.¹⁷⁹ But no more did the founders intend that the President should "in all cases" prevail, as would happen if, as Kramer and Marcuse assume, the President may finally determine what information may be withheld from Congress.¹⁸⁰ Given conflicting claims of power—spheres of power which intersect, and the necessity foreseen by Madison of protecting each department

¹⁷⁵ 2 STORY 367. Senator Edmunds said in 1886 that: "The 'state of the union' is made up of every drop in the bucket of the execution of every law and the performance of the duties of every office under the law. . . ." 17 CONG. REC. 2215 (1886).

¹⁷⁶ See note 125 *supra*.

¹⁷⁷ Congress has jurisdiction to inquire into "the administration of the Department of Justice [and of all executive instrumentalities]—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties" *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927). (Emphasis added.) See also *Watkins v. United States*, 354 U.S. 178, 187 (1957).

¹⁷⁸ "The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to be their intention, to clog and embarrass its execution, by withholding the most appropriate means." *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 408 (1819).

¹⁷⁹ *Kramer & Marcuse* 906, properly reject such a contention.

¹⁸⁰ *Id.* at 910 n.810. See text accompanying notes 38-42 *supra*.

"against the invasion of the others"¹⁸¹—the crucial question is: who shall draw the boundaries? Madison's answer in *The Federalist* is that "neither" of the departments "can pretend to an exclusive or superior right of settling the boundaries between their respective powers."¹⁸² Inescapably the task must fall to the courts; as Mr. Justice Frankfurter said in the *Steel Seizure* case, "the judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government,"¹⁸³ a thesis on which I shall hereafter dwell.

III. HISTORY MUSTERED BY ATTORNEY GENERAL ROGERS— PRESIDENTIAL "REFUSALS" OF INFORMATION

The sporadic historical incidents paraded by the Attorney General in support of the executive privilege to withhold information from Congress have been so thoroughly deflated by J. R. Wiggins¹⁸⁴ that there would be no occasion further to notice them but for continued reliance upon them to illustrate the "proliferation of justification for executive secrecy," without reference, it may be added, to the Wiggins analysis.¹⁸⁵ In retracing Wiggins' studies I have stumbled on some additional historical materials which need to be fitted into place. It would be tedious and unrewarding to accompany the Attorney General on all of his historical peregrinations, so the discussion will be confined to the first fifty years, both because they are more nearly contemporaneous with the forging of the Constitution and therefore have much greater weight than subsequent aberrations,¹⁸⁶ and because if examples culled from this period by the Attorney General do not stand up, we are entitled to doubt the efficacy of the rest.¹⁸⁷

¹⁸¹ THE FEDERALIST No. 48 (Madison).

¹⁸² *Id.* No. 49. See notes 711, 740 *infra*.

¹⁸³ 343 U.S. at 597 (Frankfurter, J., concurring).

¹⁸⁴ Wiggins.

¹⁸⁵ Younger 771, 756-63. Cf. Kramer & Marcuse 900.

¹⁸⁶ Indeed, the Supreme Court very early declared with respect to a *practice* then only a few years old, but originating from the foundation of our government, "to this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of *several years*, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken. . . ." *Stuart v. Laird*, 1 Cranch (5 U.S.) 299, 309 (1803). (Emphasis added.) How much more potent when that construction is lodged in a statute, the Act of Sept., 1789, approved by President Washington. See text accompanying note 79 *supra*.

¹⁸⁷ Mr. Justice Jackson said of a row of citations that "if the first decision cited does not support it [the proposition], I conclude that the lawyer has a blunderbuss mind and rely on him no further. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801, 804 (1961).

A. The Washington Incidents

1. The St. Clair Inquiry

The Attorney General begins with the congressional inquiry of 1792 into the failure of the St. Clair Expedition. The House had appointed a committee to inquire into "the causes of the failure of the late expedition . . . and . . . to call for such persons, papers . . . as may be necessary to assist their inquiries."¹⁸⁸ The Committee then asked the Secretary of War for documents and Washington called a Cabinet meeting.¹⁸⁹ At this meeting, Jefferson recorded, the President

neither acknowledged nor denied, nor even doubted the propriety of what the house were doing, for he had not thought upon it, nor was acquainted with subjects of this kind. He could readily conceive there might be papers of so secret a nature as that they ought not to be given up.¹⁹⁰

The Cabinet was not prepared and adjourned for study. At the second meeting, the conferees were,

of one mind 1. that the house was an inquest, therefore might institute inquiries. 2. that they might call for papers generally. 3. that the Executive ought to communicate such papers as the public good would permit, & ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion. 4. that neither the commee nor House had a right to call on the head of a deptmt. who & whose papers were under the Presidt. alone, but that the commee, shd instruct their chairman to move the house to address the President. . . . It was agreed in this case that there was not a paper which might not be properly produced. . . .¹⁹¹

¹⁸⁸ Att'y Gen. Memo. 4. See 3 ANNALS OF CONG. 493 (1792). The vote was 44 to 10. *Ibid.* The colorful background of the Expedition is recounted by TAYLOR 17-22.

¹⁸⁹ Mr. Younger tells us that "the father of his country was at sea . . . the House had taken . . . an unprecedented step." Younger 756. Both the Parliamentary and Colonial materials, see text accompanying notes 51-72 *supra*, refute his "unprecedented." TAYLOR 22, correctly states that the St. Clair investigation was "entirely in accordance with Parliamentary and colonial governmental traditions." The Younger study threatens to become a gospel of the privilege apologists, see Kramer & Marcuse 904 n.785, 906 n.803, 910 n.810, so it needs to be examined closely.

¹⁹⁰ I JEFFERSON 189.

¹⁹¹ *Id.* at 189-90. (Emphasis added.) Jefferson records that: "Hamilton agreed with us in all these points except as to the power of the house to call on heads of departmts. He observed, that as to his departmt the act constituting it [see note 79 *supra*] had made it subject to Congress in some points, but he thot himself not so far subject, as to produce all the papers they might call for. They might demand secrets of a very mischievous nature." *Id.* at 190. Jefferson's comment betrays little sympathy with this view: "Here I thot he began to fear they would go to examining how far their own members & other persons in the govmnt had been dabbling in stocks, banks & c., and that he probably would choose in this case to deny their power & in short he endeavd to place himself subject to the house when the Executive should propose what he did not like, & subject to the Executive, when the house

There is nothing to suggest that this "unofficial note" of the meeting¹⁹² was ever disclosed to Congress or that Washington asserted to Congress a plenary power to withhold information.¹⁹³ Nothing of the sort turns up in the House debate nor in Washington's writings. And Jefferson's memoir notes that it was "finally agreed to speak separation [*sic*] to the members of commee & bring them by persuasion into the right channel."¹⁹⁴ Such "persuasion" could only be embarrassed by an unnecessary and unsettling claim of unlimited discretion to withhold information, and the notes may be viewed as an unexhibited memorandum in Jefferson's own files. All of the St. Clair documents were then turned over; "not even the ugliest line on the flight of the beaten troops was eliminated,"¹⁹⁵ an example more than one agency would have done well to ponder in recent years. Thus crumbles the Attorney General's argument that this was a "refusal" to turn over documents.¹⁹⁶

The Secretaries of the Treasury and War departments appeared to make "explanations . . . in person,"¹⁹⁷ and the Secretary of War submitted that on the facts developed "no censure should be imputed to the War Department for not having paid implicit attention to this subject."¹⁹⁸ This was recognition that the House could inquire into executive conduct, that it could demand documents for

shld. propose anything disagreeable." *Ibid.* Although Hamilton stood alone and was thus inferentially rejected by Jefferson, Attorney General Rogers, Att'y Gen. Memo. 51, cites him in "support" of the view that the "public interest" may be invoked by a department head or the President "in opposition to a blanket demand for information." Hamilton's intimation that he was above the law embodied in a statute, picked up by Attorney General Rogers, will be hereinafter examined. It will also be demonstrated that his claims run counter to the very citations upon which Jefferson and the cabinet relied.

¹⁹² This note is printed among "The Anas," what Jefferson called the "loose scraps," which included "unofficial notes and memoranda of interviews and meetings." 1 JEFFERSON 154.

¹⁹³ During the course of the debate on the Aaron Burr-General Wilkinson affair in 1810, Mr. Pearson referred to the St. Clair investigation and said: "The power which Congress then exercised had not then been questioned. . . ." 21 ANNALS OF CONG. 1747 (1810). Nevertheless a number of writers have stated that the claim of privilege was "declared," TAYLOR 29, or "announced" Bishop 477. Cf. BARTH 31.

¹⁹⁴ 1 JEFFERSON 190. It is a privilege proponent who suggests that this was accomplished at Washington's request by the "cabinet's master politician," Younger 757.

¹⁹⁵ 6 FREEMAN, BIOGRAPHY OF WASHINGTON 339 (1948-1957). Washington wrote the Secretary of War, April 4, 1792: "You will lay before the House of Representatives such papers from your Department as are requested by the enclosed Resolution." 32 THE WRITINGS OF WASHINGTON 15 (1939). Even one critical of the proposed inquiry, W. Smith, stated that "in any case where it shall appear that the Supreme Executive has not done his duty, he should be fully in favor of an inquiry." 3 ANNALS OF CONG. 491 (1792).

¹⁹⁶ Att'y Gen. Memo. 4.

¹⁹⁷ 3 ANNALS OF CONG. 1106 (1792); Att'y Gen. Memo. 4.

¹⁹⁸ 3 ANNALS OF CONG. 1315 (1792).

that purpose, and that executive officers felt called upon to make explanations. Washington acquiesced in the right of Congress to institute an inquiry into the conduct of an executive officer, for on the same day that he instructed the Secretary of War to turn over the requested papers, he wrote General St. Clair:

As the House of Representatives has been pleased to institute an inquiry into the causes of the failure of the late expedition, I should hope an opportunity would thereby be afforded you. of explaining your conduct, in a manner satisfactory to the public and yourself.¹⁹⁹

Later he was more emphatic in welcoming a rumored investigation of the Secretary of the Treasury, Alexander Hamilton.²⁰⁰ Beyond doubt the power of the House to investigate into executive misconduct in the highest places was exercised and recognized from the beginning.²⁰¹

Jefferson's notes merit close attention. They were not the product of speculation *in vacuo* but, he tells us, of resort to "the proceedings of the commons in the case of S. Rob. Walpole."²⁰² Bred to the common law, Jefferson turned to English precedents to determine the respective rights of legislature and executive, and it will be instructive to scrutinize his citations to the Walpole inquiry. Materials drawn therefrom, pertinent to his first two points, show that he was entirely right in concluding that Congress could act as an "inquest" which might institute inquiries, call for papers

¹⁹⁹ Dated April 4, 1792; 32 WRITINGS OF WASHINGTON 15-16 (1939).

²⁰⁰ "With respect to the fiscal conduct of the S-t-y of the Tr-s-y I will say nothing; because an enquiry, more than probable, will be instituted next Session of Congress into some of the Allegations against him; . . . and because, if I mistake not, he will seek, rather than shrink from, an investigation . . . No one . . . wishes more devoutly than I do that they may be *probed to the bottom*, be the result what it will." Letter to Pendleton, Sept. 23, 1793. 33 WRITINGS OF WASHINGTON 95 (1940). (Emphasis added.)

²⁰¹ Contemporaneously with the St. Clair investigation, the House, sitting as a Committee of the Whole, debated a number of Resolutions charging the Secretary of the Treasury with grave derelictions, among them, with violating the terms of an appropriation law. 3 ANNALS OF CONG. 905, 907 (1792). After vigorous debate Hamilton was acquitted of wrongdoing. But the power to investigate into his official conduct was never questioned. To the contrary, Mr. Lee, who voted against the Resolutions, took as his theme "whether the Secretary of the Treasury had acted legally," *id.* at 931, and he "dilated on the necessity of the purest and most confidential communication between the Secretary of the Treasury and the Legislature . . ." *Id.* at 932.

James Madison, an advocate of the Resolutions, declared that "it was the duty of the Secretary, in complying with the orders of the House, to inform the House how the law had been executed . . . to explain his own conduct. . . ." *Id.* at 934. An opponent, Mr. Boudinot, said that "we're now exercising the important office of the grand inquest of the Nation" and noted that the inquiry was "into the conduct of an officer of the Government in a very important and highly responsible station." *Id.* at 947-48.

²⁰² See 1 JEFFERSON 190.

generally and, he might have added, require members of the "Administration" to appear before it.²⁰³

He was, however, less happy in his citations for his third point: "that the executive ought to communicate such papers as the public good would permit, ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion." This third point is crucial for privilege adherents, for upon this "precedent" the executive branch, in large part, has built its historical claims of unlimited discretion to withhold.²⁰⁴ And it appears to be the first time in Anglo-American history that a broad executive claim of "discretion" to withhold was formulated, although not communicated to Congress. Because Jefferson was not pretending to make bricks without straw but turning to precedent, it is important to examine his citations closely.

Jefferson cites first to page 81 of the proceedings²⁰⁵ at which point Pelham was expressing his opposition to a motion to refer certain papers which had been laid before the House to a Select Committee. That page contains nothing relative to executive discretion, but at page 82 Pelham stated:

When Gentlemen's curiosity prompts them to desire a Light on any papers of State, they move for having them laid before the House, and their Motion is always complied with, when consistent with the public safety.

Some support for this view is found at a point not cited by Jefferson. The House had requested all correspondence with the King of Prussia "relating to the State of War in the Empire," and the King replied that the request would be "carefully examined, in order to see how far the same may be complied with, without Prejudice to the Publick, and consistently with the Confidence reposed in him by other Princes."²⁰⁶ This caution is patently confined to matters of high import in the nature of "state secrets." Not daunted the House immediately requested all correspondence with the States General about the same subject,²⁰⁷ and later requested all corre-

²⁰³ See note 191 *supra*. Contemporary jurisprudential confirmation that the legislature is an "inquest," is found in a 1791 lecture by Justice James Wilson of the Supreme Court: "The house of representatives . . . form the grand inquest of the state. They will diligently inquire into grievances . . ." TAYLOR 13 n.*. Hale v. Henkel, 201 U.S. 43, 61 (1906), says of these lectures that Justice Wilson "may be assumed to have known the current practice . . ." See also *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). And see note 119 *supra*.

²⁰⁴ Att'y Gen. Memo. 5; Younger 771.

²⁰⁵ 1 JEFFERSON 190.

²⁰⁶ 13 Chandler 104, 107.

²⁰⁷ *Ibid*.

spondence relating to the treaty with Spain.²⁰⁸ Such stubborn insistence by the House, which was to achieve ascendancy over the King, is incompatible with an established principle of executive discretion. What the King said in fighting a lost cause was not binding on the subsequently victorious Parliament. But even the claimed discretion was of limited scope, for Sir William Yonge, another opposition spokesman, who reiterated Pelham's "consistent with the public safety" phrase, conceded that "with regard to *domestic* Affairs, we have a much greater Latitude; because we may more freely call for *all* Papers relating to any such Affair."²⁰⁹

Jefferson's second citation, to page 173, reads strongly against his proposition, as Pitt's statement at this point makes abundantly plain:

It is said, by some Gentlemen, that by this Inquiry we shall be in Danger of discovering the Secrets of our Government to our Enemies. This Argument, Sir, by proving too much proves nothing at all. If it were admitted, it would always have been, and forever will be, an Argument against our inquiring into any Affair in which our Government can be supposed to have a Concern. . . . We have had many Parliamentary Inquiries into the Conduct of Ministers of State, and yet I defy anyone to shew, that any State Affair was thereby discovered which ought to be concealed, or that our publick Affairs, either Abroad or at Home, suffered by any such Discovery.²¹⁰

Thus Pitt rejected the argument that even important secrets should stay the hand of inquiry, and this at a time when England was sore beset by foreign and domestic problems.

Finally, Jefferson cites to page 44 of the appendix, the Committee report. There the Committee recounted the refusal of John Scrope to testify about a large sum known as the "Secret Service Money" on the ground that:

The Disposal of Money issued for Secret Service, by the Nature of it, requires the utmost Secrecy, and is accounted for to His Majesty only, and therefore his Majesty could not permit him to disclose any Thing on that Subject.²¹¹

This behaviour "greatly surprised" the Committee, and small wonder. The total sum involved was about £1,380,000, which translated into present values probably represented the then staggering sum of about \$15,000,000, of which sum, according to evidence the Committee laid before the House, £1,112,831 was traced to the hands

²⁰⁸ *Id.* at 246.

²⁰⁹ *Id.* at 99. (Emphasis added.)

²¹⁰ *Id.* at 173.

²¹¹ *Id.* at App. (Comm. Rept. 44-45).

of Walpole and Scrope.²¹² Scrope was the Secretary of the Treasury and a conduit of the money to Walpole.²¹³ Consider in the light of Albert Fall's derelictions, which lay at the root of the Daugherty and Sinclair investigations, our reaction today to a refusal to account for such a sum in the teeth of a horrid suspicion that it had come to rest in executive breeches.²¹⁴ Only the protection given by the King to his favorite made concealment possible; a Scrope would receive short shrift today.

Viewed most favorably to Jefferson's claim, the Scrope citation reveals at best a refusal to make known the disposition of "secret funds" appropriated for hidden purposes, scarcely the sort of incident which will bottom "uncontrolled discretion" to withhold anything and everything. Moreover, it rests on a claim of royal prerogative that yielded to parliamentary ascendance whereunder ministerial responsibility shifted from the King to the party in power,²¹⁵ and which the Continental Congress, the state constitution-makers, and the Founding Fathers rejected out of hand.

²¹² *Id.* at 37.

²¹³ *Id.* at 34-36.

²¹⁴ *Cf.* note 23 *supra*.

Other times, other morals. In his essay on the Earl of Chatham, Macaulay, referring to the Duke of Newcastle's "disposal of that part of the secret service money which was then employed in bribing members of Parliament" during Pitt's own regime, remarks that Pitt was "himself incorruptible," but "hating the practice, yet despairing of putting it down, and doubting whether, in those times, any ministry could stand without it, he determined to be blind to it." 2 MACAULAY, ESSAYS 790 (Trevelyan ed. 1890).

²¹⁵ The "executive power is exercised under a government which is responsible to Parliament, and which is formed by and actually a part of the Parliamentary majority." TAYLOR 285. When, therefore, Philos 48, reminds us that "cabinet officials withhold information concerning executive operations from their Parliamentary colleagues [during a 'question period' on the floor] if they believe this action is necessary in the public interest," he neglects to notice that the majority, whose leadership is vested in the cabinet, *can* if it deems the issue important, compel the cabinet to furnish the information or topple it: "Ministers must answer to the Parliament for everything that they and their departments do, and must resign at once if defeated on a vote . . ." WADE, TOWARDS ADMINISTRATIVE JUSTICE 4 (1963). And, says Professor Wade, "it is a firm convention of our system that Ministers shall answer all kinds of questions about everything that falls within their sphere of responsibility . . ." *Id.* at 20.

Moreover, a Minister's refusal to answer in the hot spotlight of the floor may not deprive the Opposition of the desired information through "'the usual channels' which are said to pass 'behind the Speaker's Chair'—in other words by negotiations . . ." JENNINGS, THE BRITISH CONSTITUTION 85 (3d ed. 1950). "Once it is accepted that opposition is not only legitimate but essential to the maintenance of democratic government, the need for arrangement behind the Speaker's Chair follows naturally." JENNINGS, PARLIAMENT 158 (2d ed. 1957). "In matters of defence and foreign affairs, too, there is often consultation." *Id.* at 159. A recent news item confirms the practice. Replying to an inquiry about "Lord Denning's quasi-judicial inquiry into the security aspects of the Profumo case," Prime Minister MacMillan declared that "the report would be published after he had discussed it

2. The Jay Treaty

Next Attorney General Rogers relies on Washington's refusal in 1796 to furnish to the House correspondence, documents, and instructions to John Jay respecting negotiation of the Jay Treaty.²¹⁶ From this dry recital one can scarcely sense the tumultuous disapproval, the popular outrage, that the Jay Treaty provoked.²¹⁷ Washington himself was "dismayed" when the treaty reached him:

Jay had abandoned by implication two of the principles for which America had contended ever since the outbreak of The American Revolution—the doctrine that free ships make free goods, and that neutrals might trade freely with belligerents in noncontraband goods.²¹⁸

The treaty failed to recognize still other smarting grievances,²¹⁹ and Jay's "effectiveness as a negotiator had certainly been compromised by Hamilton's assurances" to the British Minister.²²⁰ Was the House entitled to be informed on such matters before it appropriated funds to effectuate the treaty? Vice-President Adams, who had his eye on the Presidency, and upon whom Washington now leaned after the resignations of Hamilton and Jefferson,²²¹ thought so, even after Washington's refusal: "I cannot deny the right of the House to ask for papers. . . . My ideas are very high of the rights and powers of the House of Representatives." And this despite his awareness that "these powers may be abused."²²²

with the Leader of the Opposition and agreed on what was to be left out 'either on security or any other grounds.'" *The Economist*, Aug. 10, 1963, p. 491. Similarly, it was reported with respect to H. A. R. Philby, the English journalist who defected to Russia under suspicious circumstances, that: "Prime Minister MacMillan and Harold Wilson, the Opposition Leader, refuse to discuss Philby [with others] on the ground that the national interest is involved." *N.Y. Times* (West. ed.), Aug. 5, 1963, p. 12.

²¹⁶ Att'y Gen. Memo. 5.

²¹⁷ A "storm of popular protest blew up." 2 PAGE SMITH 874. Writing to Edward Rutledge, Nov. 30, 1795, Jefferson called it "an execrable thing." 7 JEFFERSON 40. The widow of General Richard Montgomery wrote James Monroe that she "lamented the 'infamous' treaty which John Jay had made with Great Britain, and with thousands of others, had wept over the sale of her country." BEMIS xi.

²¹⁸ 2 PAGE SMITH 871. "Washington did not pretend to like the treaty. After Jay had delivered it he kept it for 4 months before he could bring himself to submit it to the Senate. He knew it would provoke a storm of protest and that the protest would have grounds to support it." BEMIS xiii.

²¹⁹ 2 PAGE SMITH 871.

²²⁰ *Ibid.* BEMIS 250 states that: "From Hamilton's astonishingly gratuitous information Greenville now knew there was no danger of what he most feared, that the United States might enter another armed neutrality."

²²¹ 2 PAGE SMITH 878-80.

²²² 2 ADAMS, LETTERS TO ABIGAIL ADAMS 223 (1841) (written April 19, 1796).

After his son, John Quincy Adams, left the Presidency and served in the House, John Quincy insisted on the right of the House to be given all papers respecting certain Mexican relations. See note 267 *infra* and accompanying text.

Washington's reasons for refusing to provide the information were (1) that the success of foreign negotiations "must often depend upon secrecy"; (2) that this was one "cogent reason for vesting the power of making Treaties in the President with the advice and consent of the Senate," thereby "confining it to a small number of members"; (3) that since this treaty-making power was thus exclusively vested in the President and Senate, "the inspection of papers asked for can [not] be relative to any purpose under the cognizance of the House . . . except that of an impeachment; which the resolution has not expressed";²²³ and (4) that "in fact, all the papers affecting the negotiations . . . were laid before the Senate."²²⁴

Washington does not here lay claim to a blanket power to *withhold* from *the Congress*, for disclosure had been made to the Senate; instead he based the withholding on the constitutional *exclusion of the House* from the treaty process. The issue he posed was not executive power *to withhold* but the *absence* in the narrow premises of legislative *power to demand*. He denied "a right in the House of Representatives to demand, and to have as a matter of course, all the papers respecting a negotiation with a foreign Power . . ." and he emphasized that he had no disposition to "withhold *any* information . . . which could be *required* of him by either House *as a right*."²²⁵ Indeed, the latter clause may be read as a disclaimer of power to withhold where there was a "right" to demand, and this is confirmed by his turnover of the disputed papers to the Senate which had a "right" to the information because its duties embraced the subject matter of treaties. That Washington should thus have attempted to limit the powers of the House rather than insist on the executive privilege to withhold at least suggests a doubt whether he could safely invoke such an executive power.

²²³ 5 ANNALS OF CONG. 760-62 (1796). Jefferson had earlier counselled Washington to the contrary. In a diary note dated April 9, 1792, Jefferson refers to Senate readiness to approve the redemption of Algerian captives but mentions that it "was unwilling to have the lower House applied to previously to furnish the money" because this "would let them into a participation of the power of making treaties." Jefferson "observed, that wherever the agency of either, or both Houses would be requisite subsequent to a treaty, to carry it into effect, it would be prudent to consult them previously, if the occasion admitted. That thus it was, we were in the habit of consulting the Senate previously, when the occasion permitted, because their subsequent ratification would be necessary. That there was the same reason for consulting the lower House previously, where they were to be called on afterwards, especially in the case of money, as they held the pursestrings and would be jealous of them." PADOVER, *THE COMPLETE JEFFERSON* 1123-24 (1943).

²²⁴ 5 ANNALS OF CONG. 761 (1796). Madison was astonished by the refusal and wrote James Monroe on April 8, 1796, that: "The prevailing belief was, that he [Washington] would send a prt if not the whole, of the papers applied for . . . he not only ran into the extreme of an absolute refusal, but assigned reasons worse than the refusal itself." 2 MADISON, *LETTERS* 96-97 (1865).

²²⁵ 5 ANNALS OF CONG. 760 (1796). (Emphasis added.)

Whether or not the House is authorized to review treaties, a subject that agitated the House far more than the issue of inspection, is for present purposes of no moment; of secrecy more will be said below. Washington's view that the power of inspection is confined to instances of impeachment put the cart before the horse—it required a preliminary decision to launch impeachment proceedings before obtaining the information upon which such a decision should rest.²²⁶ It overlooked the views expressed by his Cabinet in 1792 respecting the power of the House as an “inquest” to “institute inquiries” and “call for papers generally”²²⁷ and his endorsement of those views by his direction to turn over the requested papers in the St. Clair investigation.²²⁸ Nor did it mesh with his welcome in 1789 of a rumored investigation of Hamilton,²²⁹ and with his approval of the Act of 1789 which directed the Secretary of the Treasury to furnish information required by the Congress.²³⁰ And it was the more offensive because on prior occasions Washington had forwarded “confidential” information, even respecting pending treaty negotiations, to *both* Senate and House.²³¹ Insofar as Washington undertook to define the powers of the House, therefore, he was plainly wrong and tactically unwise; and were no more involved the incident could be left to moulder in the dusty tomes. But the Jay Treaty touched off the first full-dress examination of the legislative power to require information from the Executive.

There is a little-noticed statement made by Madison on the floor of the House after the receipt of Washington's message, per-

²²⁶ In the House, Mr. Lyman said that the “power of impeachment . . . certainly implied the right to inspect every paper and transaction in any department, otherwise the power of impeachment could never be exercised with any effect.” 5 ANNALS OF CONG. 601 (1796).

Proceeding from the acknowledged power to demand papers for impeachment purposes, a House Committee asserted in 1843: “The right of the House to information in possession of the Executive, if it exists at all, is an original right, and not acquired by asserting that it is about to resolve itself into a court of impeachment”

“[T]he right of the House to demand information from the Executive is possessed by it in the character of grand inquest of the nation [a fact earlier conceded by the Washington cabinet] . . . it is in this character it acts, whether engaged in the investigation of a petty fraud committed by some inferior officer of the Government, or in the impeachment of the President for the crime of high treason. It does not acquire the power necessary to pursue investigations by the act of proceeding to investigate The right to demand and compel information is not merely an accidental right, but an original one, inherent in it, and not an incident of some particular duty” H.R. REP. NO. 271, 27th Cong., 3d Sess. 13 (1843).

²²⁷ See text accompanying note 191 *supra*.

²²⁸ See note 195 *supra*.

²²⁹ See note 200 *supra*.

²³⁰ See text accompanying note 79 *supra*.

²³¹ See text accompanying notes 241-43 *infra*.

haps the most telling piece of evidence that can be invoked for executive privilege:

He thought it clear that the House must have a right, in all cases, to ask for information which might assist their deliberations. . . . He was as ready to admit that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure at the time. . . .

If the Executive conceived that, in relation to his own department, papers could not be safely communicated, he might, on that ground, refuse them, because he was the competent though a responsible judge within his own department.²³²

This is a surprising remark;²³³ it outran Washington's claim, for he had challenged only the right of the House to information in the treaty area without asserting a blanket right to withhold from the Congress. In any event, Madison, by his own testimony on this occasion, did not purport to represent the views of the Constitutional Convention,²³⁴ and still less did his remark represent the

²³² 5 ANNALS OF CONG. 773 (1796). Contrast this with his statement in the Congress of 1789 with respect to who should "determine the limits of the constitutional division of power between the branches of the Government". . . . I cannot imagine it will be less safe, that the exposition should issue from the legislative authority than from any other; and the more so, because it involves in the decision the opinion of both those departments, *whose powers are supposed to be affected by it*. . . . [T]he decision may be made with the most advantage by the Legislature itself." 1 ANNALS OF CONG. 520, 521 (1789-1791). (Emphasis added.) Here it was the Congress which was to determine where the line was to be drawn under the Constitution between the legislative and executive branches, although in this instance Madison was conceding a power to the President.

²³³ In his comment of April 24, 1796, to Jefferson on Washington's refusal, Madison said: "I think there will be sufficient firmness to face it with resolutions declaring the constitutional powers of the House as to treaties, and that, in applying for papers, they are not obliged to state their reasons to the Executive. In order to preserve this firmness, however, it is necessary to avoid, as much as possible an overt recouvrement with the Executive." 2 MADISON, LETTERS 90 (1867). See also note 224 *supra*. An inference that this was mere political expediency, *i.e.*, surrender of plenary power to papers in order freely to assert a claim to Treaty power, appears to be precluded by Edmund Randolph's letter of Feb. 24, 1796, to Washington: "[T]he message of to-day [this cannot be the Jay Treaty message which is dated March 30, 1796], appears to have given general satisfaction. Mr. M-d-n [Madison?] in particular thinks it will have a good effect. He asked me, whether an extract could not have been given from Mr. Morris' letter; upon my answering, that there were some things interwoven with the main subject, which ought not to be promulgated, he admitted that the discretion of the President was always to be the guide." 33 WRITINGS OF WASHINGTON 282 (1940).

²³⁴ He stated that "neither himself nor the other members who had belonged to the Federal Convention, could be under any particular obligation to rise in answer to a few gentlemen, with information, not merely of their own ideas at that period, but of the intention of the whole body; many members of which, too, had probably never entered into discussions of the subject. He might have further remarked, that there would not be much delicacy in the undertaking, as it appeared that a sense had been put on the Constitution by some who were members of the Convention, different from that which must have been entertained by others,

decided preponderance of sentiment in the House, including the views of most opponents of the House resolution.

The House began simply enough with a proposed resolution calling for information,²³⁵ promptly modified by an exception proposed by Edward Livingston for papers that "any existing negotiation may render improper to disclose."²³⁶ This proposal was swiftly engulfed by an elaborate debate whether the House had a constitutional right to review treaties in which the President and Senate had concurred. Mark that this was before Washington had said a word about the matter. The debate ran on for four weeks and is reported in 334 closely printed pages.²³⁷

The plea of "secrecy" advanced by opponents of the resolution was speedily riddled. Mr. Smith asked "are these papers secret? No, they are known to thirty Senators, their Secretary and his clerks, to all officers of Government, and to those members of this House who chose to read them."²³⁸ Mr. Williams, though he opposed the resolution, said that "he did not think there were any secrets in them. He believed he had seen them all. For the space of ten weeks any member of that [*sic*] House might have seen them [in the Senate]."²³⁹ "Secrecy" was clearly a make-weight.

To the fact that the papers had been laid before the Senate may be added the fact, as Mr. Livingston pointed out, that "from the first establishment of the Constitution . . . the Executive had been in the habit of free communication with the Legislature as to our external relations."²⁴⁰ He pointed to the fact that confidential information had been conveyed to the House respecting a treaty with Algiers and Morocco in 1790,²⁴¹ and instructions that were

who had concurred in ratifying the Treaty." 5 ANNALS OF CONG. 775 (1796). It is worth noting that Baldwin of Georgia, also a former member of the Convention, *id.*, at 700-01, and who argued for the fullest "publicity . . . in public transaction," *id.* at 435, nevertheless felt that it was subject to "but one limitation," and that "was, that, while measures were *in the transaction*, and *in an unfinished state*, it might at many times, be improper to disclose them." *Id.* at 534. (Emphasis added.)

²³⁵ *Id.* at 426. The call was for "a copy of the instructions to the Minister of the United States, who negotiated the Treaty . . . together with the correspondence and other documents relative to the said Treaty." *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Id.* at 426-760. See *id.* at 784.

²³⁸ *Id.* at 625.

²³⁹ *Id.* at 642. See also *id.* at 588.

²⁴⁰ *Id.* at 636. Mr. Livingston also cited the Parliamentary request for instructions to the Duke of Marlborough respecting negotiation of the Barrier Treaty with Holland in 1709, and other relevant correspondence, which the Queen had ratified. *Id.* at 634, 754. The opposition acknowledged the incident but sought to discredit it as a reflection of shifting political tides, *id.* at 754; but what dispute between administration and opposition is not subject to the same objection.

²⁴¹ *Id.* at 638. In his closing remarks, Madison said that: "A view of these

given to the Commissioners who were to negotiate with Spain, France and Great Britain in 1793.²⁴² Mr. Smith referred to the President's transmission of documents of a "confidential nature" respecting the Proclamation of Neutrality in 1793.²⁴³ Mr. Lyman recalled a request for a missing paper in the correspondence between Secretary of State Jefferson and the British Minister which was satisfied,²⁴⁴ as is corroborated by the debates of the earlier Congress,²⁴⁵ and as was conceded by the opposition.²⁴⁶ All of which, said Mr. Livingston, shows that "on some occasions, it was not deemed imprudent to trust this House with the secrets of the Cabinet."²⁴⁷ "Secrecy" was therefore merely a pretext to be given, as Pitt earlier remarked, little weight on the issue of withholding,²⁴⁸ and it had found small favor with Jefferson.²⁴⁹

precedents had been pretty fully presented to them by a gentleman from New York, [Mr. Livingston], with all the observations which the subject seemed to require." *Id.* at 781. Livingston had argued for the fullest disclosure.

²⁴² *Id.* at 638-39. Washington wrote the Senate and the House on Dec. 5, 1793: "On the subjects of mutual interest between this Country and Spain, negotiations and conferences are now depending. The public good requiring that the present state of these should be made known to the Legislature in confidence only, they shall be the subject of a separate and subsequent communication." 33 WRITINGS OF WASHINGTON 173 (1940). (Emphasis added.) For additional confidential communications respecting treaties to both House and Senate, see *id.* at 330, 374.

²⁴³ 5 ANNALS OF CONG. 622 (1796).

²⁴⁴ *Id.* at 601.

²⁴⁵ It was Mr. Madison who "thought there was a chasm, which should be filled up." 4 ANNALS OF CONG. 250 (1794). So the President was requested "to lay before the House the omitted letter, or such parts as he may think proper." *Id.* at 251. The entire letter was forwarded by Secretary of State Jefferson. *Id.* at 256. In 1794, Washington sent to the House a letter from "our Minister at London . . . of a confidential nature," apparently relating to a treaty. *Id.* at 462. For other confidential matters forwarded by Washington, from the commissioners at Madrid, see *id.* at 595. See also *id.* at 674, 713, 437, 393-94.

²⁴⁶ 5 ANNALS OF CONG. 649, 442 (1796).

²⁴⁷ *Id.* at 638. In defending before the Virginia Ratification Convention the provision in art. I, § 5(3), authorizing each House to keep parts of their journals secret, John Marshall stated: "In this plan, secrecy is only used when it would be fatally pernicious to publish the schemes of government." 3 ELLIOT'S DEBATES 223 (1881).

²⁴⁸ It needs to be stressed that "secrecy" was claimed solely for delicate negotiations. So Smith of South Carolina said, "in the process of negotiation, many things are necessarily suggested, the publication of which may involve serious inconvenience. . . ." 5 ANNALS OF CONG. 441 (1796). And Williams observed that "in the negotiations in time of war, confidential communications were necessary. . . ." *Id.* at 642.

²⁴⁹ In a diary note of Nov. 28, 1793, Jefferson refers to the "draught of messages on the subject of France and England." Hamilton and Knox objected to disclosure of the whole, Randolph to part; Jefferson records: "I began to tremble now for the whole, lest all should be kept secret. I urged, especially, the duty now incumbent on the President, to lay before the legislature and the public what had passed on the inexecution of the treaty, . . . it could no longer be considered as a negotiation pending. . . . The President . . . decided without reserve, that not only what had passed on the inexecution of the treaty should go in as public . . . but also that those respecting the stopping of our corn should go in as public. . . ."

Although the call for information was so early swallowed up by the debate on the role of the House in review of treaties,²⁶⁰ there was nonetheless strong and repeated insistence upon the *right* of the House to know. Mr. Nicholas alluded to the right of the House as the "grand inquest of the nation," to "superintendence over the officers of Government," and asserted that this right "gave a right to demand a sight of those papers, that should throw light upon their conduct."²⁶¹ Mr. Heath said this right was "founded upon a principle of publicity essentially necessary in this, our Republic, which has never been opposed. . . ."²⁶² Mr. Lyman added that:

The right of calling for papers was sanctioned, . . . by the uniform and undeniable practice of the House ever since the organization of the Government; . . . the House had the fullest right to the possession of *any* in the Executive Department . . . this was the *first time it had been controverted*.²⁶³

This cannot be dismissed as political rodomontade, for Washington, it will be recalled, had turned over the St. Clair papers without reference to the secret reservations for the future recorded in Jefferson's notes. Mr. Smith also said that it had been the "custom . . . invariably to ask for *all and every* paper that might lead to information."²⁶⁴ A number of opponents readily conceded the right. So, Mr. Harper agreed that if information sought by the House "came within its powers," it "in that case, would have a *right* to the papers; He would demand them and insist on the demand."²⁶⁵ Another opponent, Mr. Smith of New Hampshire, said that were the papers "necessary" to decide whether to carry the treaty into effect, he

conceived they not only possessed the right, but that it was their duty to call for *all* papers and documents which would enlighten their minds or inform their judgments on all subjects within their sphere of agency. He had always been in favor of such calls.²⁶⁶

How little Madison's views reflected those of the House is underscored by its rejection of his motion to substitute for

This was the first instance I had seen of his deciding on the opinion of one against that of three others, which proved his own to have been very strong." PADOVER, *op. cit. supra* note 223, at 1270.

²⁶⁰ This was in fact the subject of repeated comment. 5 ANNALS OF CONG. 487, 495, 717, 726 (1796).

²⁶¹ *Id.* at 444. So too Mr. Livingston, *id.* at 629.

²⁶² *Id.* at 448.

²⁶³ *Id.* at 601. (Emphasis added.)

²⁶⁴ *Id.* at 622. (Emphasis added.) Mr. Brent referred to "calls so often made for information to the Heads of Departments." *Id.* at 575.

²⁶⁵ *Id.* at 458. (Emphasis added.)

²⁶⁶ *Id.* at 593. (Emphasis added.) See also *id.* at 501, 613. Only two opponents, N. Smith and Coit, *id.* at 453, 656, claimed executive discretion to withhold.

Livingston's exception for "existing negotiations" a broader formula excepting "so much as, in his [the President's] judgment, it may not be consistent with the interest of the United States, at this time, to disclose."²⁵⁷

Cognizant of this lengthy debate, Washington, as we have seen, stated that (1) inspection of treaty papers was outside the purview of the House, and (2) the impeachment power which would authorize inspection was not named in the resolution.²⁵⁸ At once proponents of the resolution were up in arms. Indeed, Mr. Giles stated that "he never would consent to act upon [the British Treaty] till the papers deemed material to the investigation were laid upon the table."²⁵⁹ His allies insisted that the House should consider recording a refutation "for posterity."²⁶⁰ Opponents stressed that three weeks had already been consumed, that three additional weeks would be frittered away, that the House was faced with a deadline of June first on which to complete action on the treaty itself, and that there was no time to lose.²⁶¹ They were beaten and the matter was referred to the Committee of the Whole,²⁶² which then considered two resolutions: (1) that the House was empowered to consider the expediency of carrying a treaty into effect, and (2) that it need not state the purpose for which it required information.²⁶³ Mr. Madison rose to speak to these resolutions,²⁶⁴ and devoted the greater part of his remarks to the power of the House respecting treaties. At the conclusion of his lengthy remarks, the question was immediately moved by Mr. Swift, who said that:

The same principles which were involved in the present question had already undergone a discussion of three weeks, and no doubt could remain on the mind of any gentleman in that House on the subject; nor did he think that if three weeks more were to be consumed in the discussion, one opinion would be changed.²⁶⁵

The resolutions carried by 57 to 35.²⁶⁶ It may be ventured that Mr. Madison's remarks likewise did not change one opinion earlier ex-

²⁵⁷ *Id.* at 438. As Mr. Giles said: "[A] majority of the House, when their sentiments are collected, speak the sense of the House." *Id.* at 766. And Madison too said that the "meaning of the Constitution would be established, as far as depends on the vote of the House of Representatives." *Id.* at 782.

²⁵⁸ *Id.* at 761.

²⁵⁹ *Id.* at 762.

²⁶⁰ *Id.* at 768, 762-63, 765, 767.

²⁶¹ *Id.* at 763, 765-66, 769-70.

²⁶² *Id.* at 771.

²⁶³ *Id.* at 771-72.

²⁶⁴ *Id.* at 772-81.

²⁶⁵ *Id.* at 781.

²⁶⁶ *Id.* at 782-83.

pressed. His concession of more than even Washington claimed at most represents his own views, not those of the Convention nor of the House. Before, during, and after this incident, the House insisted on plenary access to information from the executive. A highlight was furnished by John Quincy Adams who, after moving from the Presidency to the House, joined in insisting that "the House had the right to demand and receive *all* the papers" respecting President Polk's instructions to our Minister to Mexico.²⁶⁷ Both John Adams and his son had great diplomatic careers and knew full well how far the need for secrecy in foreign affairs stretched and yet both affirmed the House's right to know.

B. *The Jefferson Incident*

Next Attorney General Rogers quotes a Jefferson incident as the "first authoritative instance of a President of the United States refusing to divulge confidential information. . . ."²⁶⁸ The House had requested information respecting the Burr conspiracy "*except* such as he [Jefferson] may deem the public welfare to require not be disclosed. . . ."²⁶⁹ In withholding the names of those implicated by rumor or conjecture, Jefferson nevertheless explained that "neither safety nor justice will permit the exposing names."²⁷⁰ A gratuitous explanation made to justify the exercise of expressly "excepted" discretion conferred by the House is termed an "authoritative refusal"! As a House Committee said in 1843 respecting a similar Monroe incident in 1823,²⁷¹ "the House invested the President . . . with the discretion which he exercised" and it is not to

be presumed that the exercise of the discretion by President Monroe, in a case where it was conferred upon him, proves that he would have

²⁶⁷ BEMIS, JOHN QUINCY ADAMS 532. (Emphasis added.) The House Resolution was voted 145 to 15 (for an example of similar unanimity in the Tyler administration, see note 282 *infra*), the purpose being "to air the question whether Polk had conspired with Santa Anna to overthrow the *de facto* Mexican Government on the eve of the [Mexican] war. . . ." *Ibid.* Was not this a subject of legitimate interest to the Nation and the House? But Bemis opines: "There is no question who had the better of the argument. George Washington and James K. Polk were right and John Quincy Adams was wrong." *Id.* at 532-33. Let the reader decide for himself in light of history.

²⁶⁸ Att'y Gen. Memo. 6. (Emphasis added.)

²⁶⁹ *Ibid.* Younger 758, sets out the Jefferson message without printing the House exemption.

²⁷⁰ Att'y Gen. Memo. 6.

²⁷¹ Younger 759, commenting on a House inquiry into suspension of a naval officer for misconduct and its request for related documents sets out Monroe's statement that the required documents "might tend to excite prejudices which might operate to both [accuser and accused]." The House, however, had merely requested Monroe to furnish "so far as he may deem compatible with the public interest any correspondence. . . ." Quoted in H.R. REP. NO. 271, *supra* note 226, at 13. Younger repeatedly omits to notice such exemptions.

exercised it in a case where it *was not* conferred. This would be a somewhat violent presumption.²⁷²

Let it be assumed that Jefferson's gratuitous explanation constitutes a claim of power to withhold information from Congress for the purpose of protecting unoffending citizens against injurious exposure. This is morally admirable but it may well be doubted that it is a necessary attribute of executive power. The test of an implied power is ordinarily whether it is "necessary and proper to carry into effect" an express power.²⁷³ The power to withhold information to protect a citizen from defamation is not really "necessary" to carry out any part of the executive power. Nor can it be "proper," for the President was not made the protector of the public against the representative assembly, except to the extent that he exercises the veto power. Protection from either legislative or executive excesses was confided to the courts, not to the opposing branch.²⁷⁴

Neither the Washington nor the Jefferson incidents, therefore, spells out a clear challenge to the inquiry power nor one that is sustainable in terms of "executive power."

C. *The Jackson Incidents*

If the foregoing analysis of the Jefferson vest-pocket memorandum on the St. Clair inquiry, the Washington denial of House jurisdiction in treaty matters, and the Jefferson gratuitous explanation of defamation avoidance is valid, then the first unequivocal assertion of power to withhold information from the Congress cited by the Attorney General is that of Andrew Jackson in 1835. Coming 46 years after the Act of 1789, which itself is a reflection of parliamentary and colonial history, and the steadfast congressional insistence on the plenary power to require information, little weight need be attached to this belated Jacksonian claim on the issue of constitutional construction.

The Andrew Jackson picture is mixed: he alternately furnished and refused to furnish information to the Congress.²⁷⁵ The leading incident selected by Attorney General Rogers concerns Jackson's refusal in 1835 of a Senate request for charges made to the President, which led to the removal of Gideon Fitz from office, for the purpose of acting on his successor and investigating frauds in sales

²⁷² *Id.* at 13-14. (Emphasis in original.)

²⁷³ *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 316. (1936). "[T]he genius and spirit of our institutions are hostile to the exercise of implied powers." *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204, 225 (1821).

²⁷⁴ See text accompanying notes 582-84 *infra*.

²⁷⁵ Instances are enumerated in Wiggins 80-81.

of public lands.²⁷⁶ Jackson rejected the request for information respecting "frauds in the sale of public lands" on the ground that it "would be applied in secret session" and thereby deprive a citizen of a "basic right," namely, "that of a public investigation in the presence of his accusers and the witnesses against him."²⁷⁷ It is not an easy matter to reconcile this with Jefferson's concern lest premature exposure do injustice to innocent men. Headstrong though he was, Jackson had acknowledged in 1834 that

cases may occur in the course of its legislative or executive proceedings in which it may be indispensable to the proper exercise of its powers that it should *inquire* or decide upon *the conduct* of the President or other public officers, and in *every* case its constitutional right to do so is cheerfully conceded.²⁷⁸

Fitz was a public officer and Jackson now arrogated to himself the decision whether the inquiry was "indispensable to the proper exercise" of Congress' powers, a patently untenable assertion of power. When measured against historical precedents²⁷⁹ Jackson was clearly wrong, unless we are to assume that the power to investigate executive conduct is cut off by termination of official service. Given the "inherent power of Congress to conduct investigations . . . [comprehending] probes into departments of the Federal Government to expose corruption, inefficiency or waste,"²⁸⁰ it would be insufferable if the President were able to shield documents revealing the corruption or waste by removing the official. Jackson's strictures failed

²⁷⁶ Att'y Gen. Memo. 7.

²⁷⁷ *Ibid.*

²⁷⁸ Quoted by Wiggins 80. (Emphasis added.)

²⁷⁹ Recall the parliamentary inquiry into Navy accounts in 1666, see text accompanying note 55 *supra*; into the Lord Commissioners of the Admiralty in 1741, 13 CHANDLER 208; the other inquiries into the conduct of Ministers mentioned in the Walpole proceedings, see text accompanying notes 66-72 *supra*; the Massachusetts inquiry into the failure of military officers to fulfill their duties in 1722, see text accompanying note 68 *supra*; and a similar inquiry by Pennsylvania in 1770, see text accompanying note 69 *supra*; not to mention the St. Clair and Alexander Hamilton inquiries, see text accompanying notes 188, 195 *supra*; and see text accompanying note 201 *supra*. Compare Jackson's assumption that Congress cannot inquire into the ground for removal of an officer, with Secretary of the Treasury Wolcott's invitation to the House in 1800, after his resignation, to investigate his official conduct. Landis 171, a precedent followed by Vice-President Calhoun in 1826, when he asked the House to investigate his prior administration of the War Department. *Id.* at 177.

Then, too, Congress has superior facilities to investigate executive derelictions and compel testimony by subpoena as compared to the more limited investigatory power of the President, a fact noted by the House during the Tyler administration. 3 HINDS 183.

²⁸⁰ *Watkins v. United States*, 354 U.S. 178, 187 (1957). Compare *Sinclair v. United States*, 279 U.S. 263, 294 (1929), where Sinclair had made leases of naval oil reserves with the Secretaries of the Navy and Interior (Albert Fall) and the Court declared that the Senate had power to investigate what "was being done by executive departments under the Leasing Act. . . ."

to sway his successors, Presidents Buchanan and Polk, for both expressly recognized the plenary power of Congress to investigate suspected executive misconduct.²⁸¹

D. *The Tyler Incident*

The Attorney General's memorandum also invokes "President Tyler's *refusal* to communicate to the House" reports relative to frauds on the Cherokees.²⁸² This was far from a blanket refusal;²⁸³ Tyler had dissented from a claim that the House might demand from the executive branch "all" papers without regard to executive "discretion." He did not, however, assert an *absolute* right to withhold. Instead he enumerated certain categories of information in reliance on the evidentiary privileges recognized in judicial proceedings instituted by private litigants, saying "these principles are *as applicable* to evidence sought by a legislature as to that required by a court";²⁸⁴ and he underscored his meaning by claiming, not an absolute but "a *sound* discretion in complying" with congressional calls.²⁸⁵

Notwithstanding the relatively narrow scope of the discretion

²⁸¹ For Buchanan, see note 47 *supra*. In a message to the House in 1846, President Polk said: "If the House of Representatives, as the grand inquest of the nation, should at any time have reason to believe that there has been malversation in office by an improper use or application of public money by a public officer, and should think proper to institute an inquiry into the matter, all the archives and papers of the Executive Department, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive be afforded to enable them to prosecute the investigation." 4 RICHARDSON 435. For a telling refutation of the Attorney General's reliance on the Polk incident, Att'y Gen. Memo. 11-12, see Wiggins, *Lawyers as Judges of History*, 75 Mass. Hist. Soc. Proc. 84, 101 (1963).

²⁸² Att'y Gen. Memo. 9. (Emphasis added.) The House demand was voted "yeas 140, nays 8," and as the House report emphasizes, "a majority of *both* the great political parties in the House voted for it, after it had been fully discussed." H.R. REP. No. 271, *supra* note 226, at 2. (Emphasis added.)

²⁸³ Tyler sent to the House "all the information" except: "Colonel Hitchcock's suggestions and projects that dealt with the anticipated propositions of the delegates of the Cherokee Nation; Colonel Hitchcock's views of the personal characters of the delegates were likewise not sent . . . because President Tyler felt their publication would be unfair and unjust to Colonel Hitchcock." Att'y Gen. Memo. 9.

In his message, Tyler singled out for "confidential" withholding "incomplete" inquiries so that officials under investigation would not be alerted and defeat them, and that "irremediable injury to innocent parties" flowing from "libels most foul and atrocious" might be avoided prior to establishment of their truth or falsehood. 3 HINDS 181. In this he had been preceded by Jefferson. See text accompanying note 270 *supra*. And he would withhold the names of those charged with confidential inquiries so that they might not be exposed to the resentment of those whom they impugned. *Id.* at 182.

²⁸⁴ *Ibid.* (Emphasis added.)

²⁸⁵ *Ibid.* (Emphasis added.)

claimed by Tyler, the House Committee, reporting back to the House on the President's message, promptly took issue:

The communication of evidence to a jury is promulgation of it to the country, and the law so regards it, and it is so in fact. Hence the rule which excludes evidence the disclosure of which would be detrimental to the interests of the State. But this rule is applicable only to the judicial, and not to parliamentary tribunals; and the error of the President consists in not having observed the distinction . . . [For] parliamentary tribunals . . . may conduct their investigations in secret, without divulging any evidence which may be prejudicial to the state.²⁸⁶

And, addressing itself to Tyler's reliance on English evidentiary privilege precedents establishing that "a minister of the Crown or head of a department cannot be compelled to produce any papers or to disclose any transaction relating to the executive functions of the Government, which he declares are confidential, or such as the public interest requires should not be divulged,"²⁸⁷ the Committee recurred to its earlier distinction, saying that:

In the administration of justice between private individuals the courts will not permit that the public safety should be endangered by the production of evidence having such a tendency. But in parliamentary inquiries, where the object is generally to investigate abuses in the administration itself, and where such inquiry would be defeated if the chief of the administration or his subordinates were privileged to withhold the information or papers in their possession, no such rule prevails. The cases are entirely different. In the first, the public safety requires that particular evidence should be suppressed; in the second, the public safety requires that it should be disclosed.²⁸⁸

Thus Tyler, summarizing sixty-five years of experience since the founding of the government, in the most elaborate and reasoned justification theretofore proffered, claimed no greater privilege vis-à-vis the Congress than that rather narrowly accorded in private litigation. Even so, the House immediately and soundly insisted that the policy which may justify the executive in withholding information from a litigant has no application when the issue is

²⁸⁶ *Id.* at 185.

²⁸⁷ H.R. REP. NO. 271, 27th Cong., 3d Sess. 10 (1843); Att'y Gen. Memo. 10. As the context shows, Tyler addressed himself to the "evidentiary" privilege in private litigation, not the executive privilege vis-à-vis Congress. The evidentiary privilege is of course far from absolute. See text accompanying note 405 *infra*.

²⁸⁸ H.R. REP. NO. 271, *supra* note 287, at 10. "The case for abdicating political [i.e., legislative] checks upon the executive is much weaker than that for saying that the interests of the individual litigant must yield, perhaps only for a time, to the determination by the executive as to what is admissible in evidence . . . Here departmental inefficiency, concealed for reasons of public interest [?], may not merely disappoint individual claims but endanger the whole fabric behind which it shelters—the public interest itself." Parry, *Legislatures and Secrecy*, 67 HARV. L. REV. 737, 740 (1954).

whether Congress may demand information for governmental purposes.

One who examines Attorney General Rogers' historical wanderings carefully must concur with Wiggins that "historical fact simply is overwhelmingly at war with the law as the Attorney General prefers to view it."²⁸⁹

IV. THE KRAMER AND MARCUSE DEFENSE OF EXECUTIVE PRIVILEGE

The most recent protagonists of executive privilege, Messrs. Kramer and Marcuse, discreetly skirt the Attorney General's dubious history and spread out a fresh set of "authorities," sweeping swiftly from Madison to Congressman Clare Hoffman. Apparently they would deduce from a congressional claim to inspect executive documents a contention for "power to control the execution of the laws."²⁹⁰ Their animadversions upon a congressional "power of surveillance," which they equate with "superintendence,"²⁹¹ would turn back the clock. Administration may indeed be "controlled" by investigations into "corruption, inefficiency or waste," in the sense that such inquiries may result in the removal of an official, the cut-back of an appropriation or abolition of a bureau. Yet the power to make such inquiries is no longer open to question. "Surveillance" is simply a vituperative term for legislative inquiry into executive conduct, and it is late in the day to complain of that. English "surveillance" of executive conduct was summarized in the Walpole inquiry; it was mirrored in colonial practice; and from the outset members of Congress claimed the "Right of . . . superintendence over officers of the Government" in its role of Grand Inquest.²⁹² It was against this background that Edward Livingston, one of the most learned lawyers who ever sat in the halls of Congress,

²⁸⁹ Wiggins 83. In addition to his series of Presidential pronouncements, Attorney General Rogers cites a row of opinions by various Attorneys General. Att'y Gen. Memo. 40-41. Bishop 483 rightly states that: "Attorneys General have, not surprisingly, invariably supported the constitutional right of the executive to withhold information from the Congress." But compare Cushing's remarks on the Act of 1789. See text accompanying notes 104-05 *supra*. Recognition of this advocate's role impelled Mr. Justice Jackson to thrust aside his own earlier statement as Attorney General, saying that a "judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647 (1952) (concurring opinion). See also his concurring opinion in *McGrath v. Kristensen*, 340 U.S. 162, 176 (1950), quoted *infra* note 416.

²⁹⁰ Kramer & Marcuse 905-06.

²⁹¹ *Id.* at 907.

²⁹² 5 ANNALS OF CONG. 444 (1796).

renewed the claim in 1796 to "the superintending power which the House had over all officers of Government."²⁹³ Respected scholars consider that "one of the fundamental concepts of our form of government is that the legislature, as representative of the people, will maintain a degree of supervision over the administration of governmental affairs."²⁹⁴

Where the line between such supervision and actual "control" over administration is to be drawn presents the familiar task of drawing boundary lines. But if congressional control over execution of the laws is improper,²⁹⁵ it does not follow that inquiry *after* execution has taken place into *how* the laws have been executed is also objectionable. The former may trench on the "exclusive province" of the executive, but the power of inquiry into executive conduct is beyond dispute. Granting the plenary power of administrators to execute the laws, the hardihood they have exhibited on dubious grounds in resisting requests for information would be better displayed in resisting congressional pressure to "control" administration.²⁹⁶

Messrs. Kramer and Marcuse rely also on Senator Capehart's statement that orderly government will cease "if Congress can call before it any disgruntled employee of the executive department,"²⁹⁷ buttressing this with Madison's warning that "the power of the President would be reduced to a 'mere vapor' if government officials 'joined in cabal with the senate.'"²⁹⁸ It taxes the imagination to

²⁹³ *Id.* at 629. See also note 279 *supra*. Parliament employed investigations to ascertain facts in order "(1) to assist in the wise formulation of laws, and (2) to enable Parliament to exercise a measure of *surveillance* of the activities of the civil and military officials who carried the laws into effect and spent the moneys made available by Parliament for governmental purposes." TAYLOR 7. (Emphasis added.)

De Tocqueville, that keen-eyed observer, noticed in 1831 that: "In the exercise of the executive power the President of the United States is constantly subject to a jealous supervision." DE TOCQUEVILLE 124.

²⁹⁴ GELLHORN & BYSE 166. Holmes "saw it as a basic value in the separation of powers that ultimate surveillance should rest in the legislature." HURST, JUSTICE HOLMES 99.

²⁹⁵ There have been recurrent attempts by Congressmen and Committees to influence the course of administration and, logical deductions from the "separation of powers" aside, it is by no means indisputable that such efforts are per se undesirable. See Newman & Keaton 565: "[S]ometimes the most effective method of expression of legislative will may be delegation, with virtually no standards [the present norm], but with strong legislative influence upon policy creation after the delegation has been made." DAVIS, ADMINISTRATIVE LAW 55 (1951). (Emphasis in original.)

²⁹⁶ Newman & Keaton 594.

²⁹⁷ Kramer & Marcuse 847. They take no notice of Senator O'Mahoney's reply, "the Senator is not talking seriously." 103 CONG. REC. 9150 (1957). Throughout Messrs. Kramer and Marcuse single out partisan excerpts from opposition Senators Capehart, Donnell and Congressman Clare Hoffman.

²⁹⁸ Kramer & Marcuse 912 n.817, 847 n.529.

believe that "disgruntled employees" are likely to form a "cabal with the Senate" to fetter the President, and of course Madison had nothing of the sort in mind. He was discussing a proposal that the *Secretary* of the Department of Foreign Affairs should be removable by the President and suggested that an officer appointed with Senate consent may seek to curry "favor" with it, connect himself with the Senate, and thereby reduce "the power of the President to a mere vapor; . . . The *high executive* officers, joined in cabal with the Senate, would lay the foundation of discord. . . ."²⁹⁹ A minor "disgruntled employee" in "cabal with the Senate" would be a Halloween hobgoblin. And major "disgruntled employees" have appeared before the Congress without bringing down the skies. Sundry admirals and generals who favored the award of a multi-billion dollar contract to Boeing Company appeared in 1963 before a Joint Congressional Subcommittee in opposition to Secretary of Defense McNamara's award to General Dynamics.³⁰⁰ Doubtless it would be less trying to a Cabinet member and to the President were an iron curtain to shield differences of opinion within a Department, but apparently President Kennedy concluded that ventilation of such differences was preferable to the suspicion and resistance that would be engendered by concealment. "Orderly government" has not "ceased."

Further, Kramer and Marcuse reject the argument that the power to abolish agencies gives Congress power to "inspect their documents" on the ground, quoting Younger, that the "executive branch as we know it would disappear from our polity, leaving in its place another unfortunate example of government by legislature."³⁰¹ Mr. Justice Holmes, on the other hand, insisted that Congress' power to "abolish" an office clearly carried lesser powers in its train.³⁰² To argue that Congress may "abolish" an agency but must do so blindly, without access to information withheld by the executive, without opportunity to evaluate whether reorganization or modification may not be preferable to abolition, is to insist that Congress, like Charles Lamb's Chinaman, must burn down the barn

²⁹⁹ 1 ANNALS OF CONG. 480 (1789-1791). (Emphasis added.) Experience has disproved this prophecy. Congress has limited the President's power to remove members of independent agencies, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), without producing "cabals" or reducing the President's power to "mere vapor." Indeed, it is the President who has kept members of the independent agencies, which are the arm of Congress, *id.* at 628, under the executive thumb. One need only recall the pressure exerted by President Eisenhower's man Friday, Sherman Adams. Kramer & Marcuse 696, 698, 700, 702. These members are well aware that they will come up for reappointment by the President.

³⁰⁰ N.Y. Times (Western ed.), March 29, 1963 p. 1, col. 2.

³⁰¹ Kramer & Marcuse 906.

³⁰² *Myers v. United States*, 272 U.S. 52, 177 (1926) (dissenting opinion).

to roast the pig.³⁰³ Assuredly one who has the power to destroy or abolish must enjoy the lesser power of inspection to avoid destruction. And the argument that inspection spells executive destruction is at war with the fact that for 170 years the executive branch has made disclosure in the vast bulk of cases³⁰⁴ and yet survived, and that administration was not noticeably impaired by President Kennedy's stringent bar of privilege claims.

Kramer and Marcuse would draw comfort from Madison's statement that "the legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases. . . ."³⁰⁵ Clearly, however, Madison did not mean by this that thereafter Congress had no power to inquire into how the laws were being executed. On the occasion of an inquiry into charges against Secretary of the Treasury Hamilton, he said that "it was the duty of the Secretary, in complying with the orders of the House, to inform the House how the law had been executed."³⁰⁶ For, as he said on another occasion, "the right of freely examining public characters and measures, and of free communication thereon, is the only effective guardian of every right."³⁰⁷

V. THE ATTORNEY GENERAL'S CITATIONS TO THE CASES FOR "UNCONTROLLED DISCRETION" TO WITHHOLD

Attorney General Rogers advised the Senate that "*courts have uniformly held* that the President and the heads of departments have uncontrolled discretion to withhold information and papers in the public interest."³⁰⁸ This is wrong, with respect to both private litigation and the Congress. The Attorney General himself notes with respect to the "flat refusal of executives to answer questions" that "the legal problems involved were *never presented* to the courts. Thus it remains an *open question* whether the executive officers must submit all the information which Congress may request."³⁰⁹ Not-

³⁰³ As was said in launching the parliamentary inquiry into Robert Walpole's regime: "Would not a Physician be a Madman, to prescribe to a Patient, without first examining into the State of his Distemper, the Causes from which it arose, and the Remedies that had before been applied?" 13 CHANDLER 85. Cf. Landis 196.

³⁰⁴ Att'y Gen. Memo. 2, states that there has been withholding in "only . . . relatively few instances in our history."

³⁰⁵ Kramer & Marcuse 906.

³⁰⁶ 3 ANNALS OF CONG. 934 (1793).

³⁰⁷ 6 WRITINGS OF JAMES MADISON 398 (1906). Madison voted for the St. Clair investigation. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927). He vigorously participated in the Hamilton inquiry, 3 ANNALS OF CONG. 934-46 (1793), and pressed the Resolution requesting the Jay Treaty papers. 5 ANNALS OF CONG. 759 (1796).

³⁰⁸ Att'y Gen. Memo. 1. (Emphasis added.)

³⁰⁹ *Id.* at 62. (Emphasis added.) In *Kaiser Aluminum & Chem. Corp. v. United*

withstanding, the Attorney General sets out a row of cases for an "uncontrolled discretion" to withhold information from "Congressional Committees."³¹⁰

A. *Appeal of Hartranft*

A convenient beginning is the citation of *Appeal of Hartranft*,³¹¹ both because its inappositeness is quickly perceived and because it nevertheless continues to be invoked.³¹² There a grand jury had subpoenaed the Governor to explain the suppression of riots with military means during a railroad strike. The court declared: "It is *his duty* from time to time, 'to give to the General Assembly information of the State of the Commonwealth,' but it is *not* his duty to render such an account to the *grand jury*. . . ."³¹³ Generalizations about the separation of powers uttered in a case which goes on to state that the duty of furnishing information not owed to the grand jury *is owed* to the General Assembly are obviously of little aid.³¹⁴

B. *Aaron Burr Case*

The trial of Aaron Burr represents bedrock on the issue of executive privilege, not only because Chief Justice Marshall so thoroughly canvassed almost every issue that bedevils us today, but because he knew at first hand the problems of both the legislative and executive branches. He had been a member of the Virginia Assembly, had taken vigorous part in obtaining ratification of the Constitution, and had been a member of Congress. He had defended the Jay Treaty, had been a member of the "XYZ" mission to France, and had served as Secretary of State under John Adams.³¹⁵

States, 157 F. Supp. 939, 945 n.7 (Ct. Cl. 1958), Mr. Justice Reed, sitting by designation, said: "The assertion of such a privilege by the Executive, vis-à-vis Congress, is a judicially undecided issue." A recent proponent of executive privilege, Younger 769 n.49, states that: "At the time of the Attorney General's memorandum there were no holdings that the President has an 'uncontrolled discretion to withhold the information'." There have been none since. The Attorney General's claim has been rejected by Bishop 478, and by Schwartz 13. The Air Force General Counsel testified that: "There has never been a case which has been litigated that says the Executive may withhold, from Congress. *Moss Hearings* 12-13. More recently Kramer & Marcuse 903, stated that, "no court has as yet upheld the power of the Executive Branch to withhold information from Congress." It is time to examine the Attorney General's brave array of cases which are allegedly to the contrary.

³¹⁰ Att'y Gen. Memo. 32 *et seq.*

³¹¹ *Id.* at 40; *Appeal of Hartranft*, 85 Pa. 433 (1877).

³¹² Younger 777-78. Younger circumspectly notes that "no legislative demand for information was involved here" but states that the "court used language from which the judicial attitude towards executive secrecy may be inferred."

³¹³ *Appeal of Hartranft*, 85 Pa. 433, 450 (1877). (Emphasis added.)

³¹⁴ Younger 778, states that "Hartranft suggests that the separation of powers is a necessary foundation for the doctrine of executive secrecy."

³¹⁵ See 12 *DICTIONARY OF AMERICAN BIOGRAPHY* 315 (1933). Marshall "had

His was therefore an informed judgment, reflecting practical experience in both branches of the government plus immediate comprehension of constitutional design.

The Burr case thrashed out two issues which are relevant to our discussion: (1) amenability of executive officers to process, and (2) whether the executive is privileged to withhold documents from an accused.

1. The Executive Branch is Amenable to Process

The Attorney General mistakenly asserts that neither the President nor the department heads are amenable to process.⁸¹⁶ But the Attorney General himself states that "Judge [*sic*] Marshall . . . allowed the subpoena [*duces tecum*] to issue" against President Jefferson and that Marshall claimed for the "court the right to issue a subpoena against the President."⁸¹⁷ Marshall stated that "such a subpoena may issue. In the provisions of the constitution, and of the statutes, which give the accused the right to compulsory process of the court, there is no exception whatever."⁸¹⁸ He rejected the reservation in the law of evidence for the King—which was based on the ground that it was "incompatible with his dignity to appear under the process of the court"—because the "principle of the English constitution that the king can do no wrong" was inapplicable to our government whereunder "the president . . . may be impeached and may be removed from office." And, Marshall added, "it is not known ever to have been doubted, but that the

better opportunities than any student of history or law to-day to discover the intention of the framers of the federal Constitution." BEARD, *THE SUPREME COURT AND THE CONSTITUTION* 113 (1912).

⁸¹⁶ The Attorney General refers to criticism of the Burr decision on the ground that "courts cannot order the President to do anything." Att'y Gen. Memo. 36. And he asks, alluding to the separation of powers, "would the executive be independent of the judiciary if he were subject to the commands of the latter . . . ?" *Id.* at 37. He adds that Jefferson "was prepared to resist, by force, if necessary, the execution of the process of the court." *Id.* at 37. He likewise asserts that "heads of Departments may not be compelled to attend a trial," *id.* at 38, and that: "Heads of Departments are subject . . . to the directions of the Presidents of the United States. They are not subject to any other directions." *Id.* at 2. Given a subpoena *duces tecum*, he asserts: "The President may intervene and direct the Cabinet officer or department head not to appear; the person subpoenaed would then advise the court of the President's order and abstain from appearing altogether." *Ibid.*

⁸¹⁷ *Id.* at 34-36. According to Marshall, the "attorney for the United States avowed his opinion, that a general subpoena might issue to the president, but not a subpoena *duces tecum*." 1 ROBERTSON 176. This avowal gains importance from the fact that it was made by William Wirt, who was of counsel for the government, *id.* at 136, later became Attorney General in the Monroe Administration, a post he "held for twelve consecutive years." 20 *DICTIONARY OF AMERICAN BIOGRAPHY* 420 (1933).

⁸¹⁸ *United States v. Burr*, 25 Fed. Cas. 30, 34 (No. 14692d) (C.C. Va. 1807).

chief magistrate of a state may be served with a subpoena ad testificandum."³¹⁹ Thus, fully alive to the gravity of the issue, Marshall was at pains to put beyond doubt that a subpoena could reach the President. And he concluded that "a subpoena duces tecum, then, may issue to any person to whom an ordinary subpoena may issue. . . ."³²⁰ So much is conceded.

But the Attorney General labels Marshall's decision "unsound, for the reason" that the President "is in a position to completely disregard the court's subpoena or order. Since such disregard brings contempt upon a court [?], it would appear wise for the court not to issue a futile order or command."³²¹ What an extraordinary statement to come from the chief law enforcement officer under "a government of laws and not of men"! Congress itself has obeyed the courts.³²² Long since the Supreme Court said that "no officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest are creatures of the law, and are bound to obey it."³²³ This has been the premise on which courts have repeatedly issued their mandates to administrative agencies,³²⁴ often in the teeth of prior administrative determinations that the adversary was not entitled to relief. For, as Chief Justice Marshall said in *Marbury v. Madison*,

it is, emphatically, the province and duty of the judicial department, to say what the law is. [And, he asked,] to what purpose are powers limited, and to what purpose is that limitation committed to writing,

³¹⁹ *Ibid.* A governor of a State remains amenable to federal process, Sterling v. Constantin, 287 U.S. 378, 393 (1932), and viewed practically it is hard to conceive why the head of a department should enjoy greater immunity.

³²⁰ *United States v. Burr*, 25 Fed. Cas. 30, 34 (No. 14692d) (C.C. Va. 1807).

³²¹ Att'y Gen. Memo. 36. In *Glidden Co. v. Zdanok*, 370 U.S. 530, 571 (1962), the Court adverted to the cases in which it had "asserted jurisdiction . . . despite persistent and never-surmounted challenges to its power to enforce a decree. . . . [T]his Court may rely on the good faith of state governments or other public bodies to respond to its judgments."

³²² In 1876 the House cited one Kilbourn for contempt and committed him to the district jail. He then sued out a writ of habeas corpus and the district court ordered that he should be brought to court: "Some of the Representatives urged that the writ should be disregarded, but cooler counsels prevailed, and the House honored the writ by directing the Sergeant-at-Arms to produce 'the body of said Kilbourn before said court'!" TAYLOR 46-47. The Senate responded to a similar order in *Jurney v. MacCracken*, 294 U.S. 125, 143 (1935).

³²³ *United States v. Lee*, 106 U.S. 196, 220 (1882).

³²⁴ "[C]ourts customarily issue mandatory or injunctive orders against administrative officers, high or low, including cabinet officers. The only way to enforce the orders is by contempt proceedings. Courts can hardly refrain from control of administrative action because they do not want to send high officers to jail for contempt. Even when the President is the chief actor, the Supreme Court does not hesitate to enjoin the Secretary of Commerce. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)." 1 DAVIS, ADMINISTRATIVE LAW TREATISE 591 n.45 (1958).

if these limits may, at any time, be passed by those intended to be restrained?⁸²⁵

Marshall entertained no doubts about the power of the courts to *compel* an officer to obey the law:

If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and *being compelled* to obey the judgment of the law.⁸²⁶

Here is foreshadowed the doctrine, commonly associated with *Ex parte Young*⁸²⁷ and *United States v. Lee*,⁸²⁸ that an officer who ex-

⁸²⁵ 1 Cranch (5 U.S.) 137, 177, 176 (1803). Although Admiral Louis Strauss stubbornly refused to testify as to his conversations with Sherman Adams, chief Presidential aide, and other members of the White House staff respecting the Dixon-Yates contract, he agreed that "he would submit to rulings of the Supreme Court." Kramer & Marcuse 715.

Only one example of Presidential resistance to judicial fiat comes to mind, Lincoln's continued suspension of habeas corpus in the teeth of judicial condemnation. Initially he sought to deal with secessionists who threatened to withdraw Maryland from the Union. 2 HOCKETT 280. Chief Justice Taney granted a writ for one alleged secessionist and when the military resisted he issued an attachment for contempt, which was "resisted by a force too strong for me to overcome." *Ex parte Merryman*, 17 Fed. Cas. 144, 153 (No. 9487) (C.C. Md. 1861). His course was followed by courageous lower court judges in the midst of the war. *Ex parte Benedict*, 3 Fed. Cas. 159 (No. 1292) (N.D.N.Y. 1862); *United States ex rel. Murphy v. Porter*, 27 Fed. Cas. 599 (No. 16074a) (C.C.D.C. 1861).

Lincoln disregarded Taney's opinion, saying that: "Blackstone did not have to consider a situation in which Parliament was not in a position to act . . . [H]e felt that he was justified [in suspending the writ] because disloyal men might destroy the country if they were not imprisoned in time." Goodhart, *Lincoln and the Law*, 50 A.B.A.J. 433, 440 (1964). But compare *Ex parte Milligan*, 4 Wall (71 U.S.) 2 (1866). His view in a normal situation may be gathered from his Springfield address on the *Dred Scott* decision on June 26, 1857: "We think its [the Supreme Court's] decisions on constitutional questions, when fully settled, should control . . . [W]e shall do what we can to have it overrule itself. We offer no resistance to it." Goodhart, *supra*, at 439. This sentiment he echoed in his First Inaugural Address. LINCOLN, COLLECTED WORK 268 (1953).

During World War I, "profiting by Lincoln's experience President Wilson was careful to obtain Congressional support for all of his acts involving civil rights." 2 HOCKETT 293. And during the "Steel Seizure" crisis in the midst of the Korean War, President Truman "publicly promised to comply with any decision the Supreme Court might make [as well as to carry out any statutory mandate that might be forthcoming]. Mr. Truman kept his promise." SCHUBERT, *THE PRESIDENCY AND THE COURTS* 313 n.31 (1957).

⁸²⁶ *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 170 (1803). (Emphasis added.) *Marbury v. Madison* was decided as political lightning crackled about the Court. But Marshall justly pointed out that in 1794, the Secretary of War, acting by virtue of an Act of 1793, appeared in response to a motion for mandamus made by Attorney General Randolph, and that both the Secretary and "the highest law officer of the United States" thought the mode of relief appropriate. *Id.* at 171-72. The matter is recounted in 11 ANNALS OF CONG. 923-25 (1802). Compare the remarks of Congressman Bayard, *id.* at 615.

⁸²⁷ 209 U.S. 123, 160 (1908).

⁸²⁸ 106 U.S. 196 (1882).

ceeds his authority is stripped of his official capacity and may be haled as a wrongdoer before a court in his *individual capacity*, even though the government is "stopped in its tracks," as happened "when Mr. Sawyer (who just happened to be Secretary of Commerce) was restrained from executing the President's decision to seize strike-threatened steel mills in order to assure continued production during the Korean War."⁸²⁹ And when the same Mr. Sawyer, now joined by the Solicitor General in another case, was recalcitrant, arguing that "courts cannot 'coerce' executive officials," both speedily learned better. Judge Prettyman, writing for the court of appeals which held them in contempt, affirmed that "government officials are bound to obey the judgment of a court just as are private citizens. . . ."⁸³⁰ The lesson of the *Steel Seizure Case* is that if executive action is unauthorized it will be halted by the courts even though undertaken at the behest of the President to meet an unmistakable crisis. Few indeed will be the occasions for withholding information from Congress which will so imperiously call for executive action. To be sure, the threshold questions are

⁸²⁹ GELTHORN & BYRNE 352.

⁸³⁰ *Land v. Dollar*, 190 F.2d 623, 633, 638 (D.C. Cir.), *motion for stay denied*, 341 U.S. 912 (1951). As Bishop 482 notes: "The concurring opinion of Mr. Justice Frankfurter in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 472-473 (1951), 'assumes,' no doubt correctly, that the Attorney General could be reached by judicial process if that were necessary to compel him to disclose information which he is not privileged to withhold." Chief Justice Marshall, in *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 164 (1803), asked: "Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate . . . ? Is it to be contended that the heads of departments are not amenable to the laws of their country?" See also text accompanying notes 323-330 and note 313 *supra*.

Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166, 171 n.19 (1958), states that "no court . . . has ever compelled the chief executive to furnish information in a judicial proceeding. There appear to be but two decisions on the subject, one by the highest court of New Jersey and the other by that of Pennsylvania, both of which held that the separation of powers doctrine barred an order to compel a governor to disclose information in his possession. *Thompson v. German Valley K.R.*, 22 N.J. Eq. 111 (Ch. 1871); *Appeal of Hartranft*, 85 Pa. 433 (1877)." *Hartranft* turned on the fact that the Governor was under no duty to furnish information to a grand jury, that his duty ran to the legislature. See text accompanying note 313 *supra*.

Thompson v. German Valley was not decided in the "highest court of New Jersey" but by a chancellor in equity, i.e., a trial court. There the Governor, in response to a subpoena duces tecum, produced a copy of a private statute and "placed this paper where it can be examined and produced in evidence." 27 N.J. Eq. at 113-14. The court mistakenly read the *Burr* case as allowing the executive "to withhold any paper or document in his possession. . . ." *Id.* at 113. Compare text accompanying notes 339-40 *infra*.

Finally, the New Jersey court said: "It is possible that there may be cases where courts, from the conduct of an Executive, might deem it proper to proceed against him for contempt. But this is not one of them. . . ." *Id.* at 115.

whether (1) Congress is authorized to demand information from the executive branch, and (2) whether the courts are authorized to entertain an adversary proceeding on that issue. But once that is established, the power to compel is no less available here than elsewhere in the administrative process.

2. The *Burr* Case Rejected a Discretionary Power to Withhold

In the *Burr* trial, says the Attorney General, "Judge Marshall ruled that the President was free to keep from view such portions of the letter [from General Wilkinson to President Jefferson] which the President deemed confidential in the public interest."³³¹ This statement is at a considerable remove from fact. At the outset it is necessary to separate what Jefferson said from what he did. While he asserted his power to withhold information from the court,³³² he also stated his readiness to comply and in fact he *jolly complied* with the subpoena.³³³ The earlier argument had almost exclusively revolved about a letter from General Wilkinson and it had been argued on Jefferson's behalf that it was

improper to call upon the president to produce the letter of Gen. Wilkinson, because it was a private letter, and probably contained confidential communications, which the president ought not and could not be compelled to disclose. It might contain *state secrets*, which could not be divulged without endangering the national safety.³³⁴

Jefferson left it to government counsel, George Hay, "to withhold communication of any parts of the letter which are not *directly*

³³¹ Att'y Gen. Memo. 35.

³³² See 9 WRITINGS OF JEFFERSON 55-62 n.1 (Ford ed. 1899), for his correspondence concerning the subpoena.

³³³ Jefferson, on June 12, 1807, wrote George Hay, the United States District Attorney, that he had delivered the papers to the Attorney General, and instructed the War and Navy Departments to review their files with a view to compliance. 1 ROBERTSON 210-11. On June 17, 1807, Jefferson wrote Hay that: "[T]he receipt of these papers [by Hay] has, I presume, so far anticipated, and others this day forwarded will have *substantially fulfilled* the object of a subpoena from the District Court of Richmond. . . ." *Id.* at 265. (Emphasis added.)

When Jefferson learned that the Attorney General did not have the Wilkinson letter subpoenaed by Burr, he wrote Hay on June 23, 1807: "No researches shall be spared to recover this letter, & if recovered, it shall immediately be sent on to you." 9 WRITINGS OF JEFFERSON 61 (Ford ed. 1899). Hay advised the court that: "When we receive General Wilkinson's letter, the return will be complete." 1 ROBERTSON 267. Jefferson also stated that if Burr should "suppose there are any facts within the knowledge of the heads of the departments or of myself . . . , we shall be ready to give him the benefit of it by deposition. . . ." *United States v. Burr*, 25 Fed. Cas. 55, 69 (No. 14693) (C.C. Va. 1807). Notwithstanding Jefferson's attempts to comply with the subpoena, Attorney General Rogers states that Jefferson "paid no attention to the subpoena"! Att'y Gen. Memo. 35.

³³⁴ *United States v. Burr*, 25 Fed. Cas. 30, 31 (No. 14692d) (C.C. Va. 1807). (Emphasis added.)

material for the purposes of justice."⁸³⁵ Hay emphasized that he was willing to disclose the entire letter to the court, and to leave it to the court to suppress so much of the letter as was not material to the case.⁸³⁶ This was re-emphasized in his return to the subpoena duces tecum wherein he returned a copy of the letter

excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defense of the accused, or pertinent to the issue now about to be joined. . . . The accuracy of this opinion I am willing to refer to the judgment of the court, *by submitting the original letter to its inspection.*⁸³⁷

Far from asserting a claim of absolute privilege, therefore, the government was perfectly willing to leave it to the court to determine whether portions of the letter were in fact privileged. It insisted only that the portions so adjudged should be withheld from the defendant. To this the defendant objected that the court could not judge whether the confidential portions were relevant to the defense until that defense was fully disclosed, and that defendants were not required to make such disclosure until they had put in their case.⁸³⁸

⁸³⁵ 1 ROBERTSON 211. (Emphasis added.)

Because Jefferson had thus devolved on Hay the exercise of "discretion" to withhold non-material parts of the letter, *United States v. Burr*, 25 Fed. Cas. 55, 65 (No. 14693) (C.C. Va. 1807), Chief Justice Marshall said, "the *president* has assigned no reason whatever for withholding the paper called for. The propriety of withholding must be decided by *himself*, not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge. It is their operation on *his* mind, not on the mind of others, which must be respected by the court." *United States v. Burr*, 25 Fed. Cas. 187, 192 (No. 14694) (C.C. Va. 1807). (Emphasis added.) In other words the *initial* judgment of need to withhold must be made by the President, not left to a subordinate.

⁸³⁶ Thus Hay said: "The application made by the defendant is that testimony which concerns himself should be adduced; that what tends to his own just defense and exculpation may be brought forward. Is it right that he should have more? Is it proper, fair or right that he should have the liberty of going through the whole letter, as well those parts which do not relate to him as those which do, for the purpose of making unfavorable impressions on the public mind, . . . making public confidential communications respecting private characters, and thereby producing controversies and violent quarrels. *I wish the court to look at the letter and see whether it does not contain what ought not to be submitted to public inspection.*" 2 ROBERTSON 509.

⁸³⁷ 25 Fed. Cas. 187, 190 (No. 14694) (C.C. Va. 1807). (Emphasis added.) Marshall said: "I do not think that the accused ought to be prohibited from seeing the letter" *Id.* at 192. The Attorney General himself says that: "Judge [sic] Marshall made it clear that if a letter in the possession of the President material to the trial contains matter—'which it would be imprudent to disclose, which it is not the wish of the executive to disclose; such matter, *if it be not immediately* and essentially applicable to the point, will, of course, be suppressed.'" Att'y Gen. Memo. 36. (Emphasis added.) In short, Marshall would exclude only irrelevant or immaterial matter, not the entire letter. Whether the adversary should inspect the entire letter is another matter, discussed *infra*.

⁸³⁸ 2 ROBERTSON 516.

It was on this state of facts that Chief Justice Marshall ruled that the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted. . . . The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives *may be such* as to restrain the court from enforcing its production. . . . I can readily conceive that the president might receive a letter which it would be improper to exhibit in public, because of the manifest inconvenience of its exposure. The occasion for demanding it ought, in such a case, to be very strong, and to be *fully shown to the court before its production could be insisted on.*³³⁹

And, referring to private letters sent to the President respecting matter of public concern, Marshall stated that they "ought not on light ground to be forced into public view."

Yet it is a very serious thing, if such letter should contain any information material to the defense, to withhold from the accused the power of making use of it. . . . I cannot precisely lay down any general rule for such a case. *Perhaps* the court ought to consider the reasons, which would induce the president to refuse to exhibit such letter as conclusive on it, *unless such letter could be shown to be absolutely necessary* in the defense. The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the *court could not refuse to pay proper attention to the affidavit of the accused.* But on objections being made by the president to the production of a paper, the *court would not proceed further in the cause without such an affidavit as would clearly show the paper to be essential* to the justice of the case. . . . [T]o induce the court to take any definite and decisive step with respect to the prosecution, *founded on the refusal of the president to exhibit a paper, for reasons stated by himself, the materiality of that paper ought to be shown.*³⁴⁰

And he finally stated that "I do not think that the accused ought to be prohibited from seeing the letter. . . ."³⁴¹

Plainly all this contradicts Attorney General Rogers' statement that Marshall "ruled that the President was free to keep from view such portions of the letter which the President deemed confidential in the public interest. The President alone was judge of what was

³³⁹ United States v. Burr, 25 Fed. Cas. 187, 191-92 (No. 14694) (C.C. Va. 1807). (Emphasis added.)

³⁴⁰ *Ibid.* at 192. (Emphasis added.)

³⁴¹ *Ibid.* Lest it be thought the rule in civil cases may be narrower, note Marshall's statement that "if this might be likened to a civil case, the law is express on the subject. It is that either party may require the other to produce books or writings in their possession or power which contain evidence pertinent to the issue." *Ibid.* at 191. We need look no further than United States v. Reynolds, 345 U.S. 1, 9-10 (1953), for confirmation that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."

confidential."³⁴² For Marshall asserted judicial power to decide whether an executive claim of privilege had merit and that a claim of secrecy in the "public interest" would have to yield to the necessities of the accused.

3. *Marbury v. Madison*

Attorney General Rogers says that *Marbury v. Madison*³⁴³ "defines the limits at which a court must stop when the head of a department invokes the privilege that the information sought from him is confidential and cannot be disclosed," and cites it as an illustration of the "fundamental theory which justifies an uncontrolled discretion in the heads of executive departments. . . ."³⁴⁴ He himself quotes Marshall as saying in the Burr trial, with respect to *Marbury v. Madison*, that "the principle decided there was that communications from the President to the Secretary of State could not be extorted from him."³⁴⁵ The respect such communications deserve scarcely gives rise to "uncontrolled discretion" to withhold information respecting "corruption, inefficiency or waste" or other matters required as background for informed legislation or appropriation. And so *Marbury*, *Burr* and *Hartranft* no more support the claim to "uncontrolled discretion" to withhold than do the historical "precedents" earlier examined.

Set against the plainly inapplicable *Hartranft* is a 1951 advisory opinion of the Massachusetts Supreme Judicial Court that unmistakably rejects the claim of executive privilege. The Massachusetts Senate subpoenaed a Massachusetts Commission to produce a report submitted to it by a marketing firm for purposes of legislation respecting taxation and employment security. Rejecting a claim of executive privilege, the court said:

[I]t is held here and in other jurisdictions that inasmuch as any legislative body, in order to carry out the objects of its existence, must have means of informing itself about subjects with which it may be called upon to deal, it has as an attribute of its legislative function power to summon witnesses and to compel them to attend and make disclosure of pertinent facts and documents. . . . The attempt of the Senate to secure such information as might be contained in the report was *not an interference with the executive department* of the government in violation of art. 30 of the Declaration of Rights, relating to *separation of powers*. . . . It was a permissible exercise of an attribute pertaining to legislative power. If the legislative department were shut off in the manner proposed from access to the papers and records of executive

³⁴² Att'y Gen. Memo. 35.

³⁴³ 1 Cranch (5 U.S.) 137 (1803).

³⁴⁴ Att'y Gen. Memo. 32.

³⁴⁵ *Id.* at 34. (Emphasis added.)

and administrative departments, boards, and commissions, it could not properly perform its legislative functions.³⁴⁶

VI. EXECUTIVE DISOBEDIENCE OF STATUTORY REQUIREMENTS

Among the arguments advanced under the banner of executive privilege, none is more danger laden than the contention that even enacted statutes can be defied in its name.³⁴⁷ Respect for law is a precondition of democratic government; without it there could not be policemen enough to make possible a stable society. That the law binds all, officers as well as citizens, "from the highest to the lowest," has long been an axiom of government.³⁴⁸ It is therefore startling when executive officials declare themselves free to decide which laws are binding upon them.

Thus far the only act considered has been that of September 2, 1789, which directed the Secretary of the Treasury to furnish information required by the Congress.³⁴⁹ There are others. A statute directing the Commissioner, later the Secretary of Agriculture, to make "reports on particular subjects whenever required to do so by . . . either House of Congress" originated in 1862.³⁵⁰ Such pro-

³⁴⁶ Opinion of the Justices, 328 Mass. 655, 660-61, 102 N.E.2d 79, 85 (1951). (Emphasis added.) Younger 779, thrusts the case aside because it "does not involve the doctrine of executive secrecy." First he states that the court's reference to the absence of "diplomatic, military, or other secrets involving the security of the State" confuses the political doctrine of executive secrecy with the evidentiary rule of executive privilege." It is Mr. Younger who is himself "confused." The immunity has been claimed both in private litigation, *United States v. Reynolds*, 345 U.S. 1 (1953), and against the legislature. The "political" claim of executive secrecy for "diplomatic" secrets was rejected by Parliament in the Walpole inquiry, it was put out of bounds by the Continental Congress, and prior to the Jay Treaty full disclosure of "diplomatic secrets" had been made to the House, see text accompanying notes 240-47 *supra*, and the Senate was given the Jay "secrets," see text accompanying note 224 *supra*.

Next Mr. Younger argues that "the chief executive here never invoked secrecy, and no inferior official is entitled to do so in his place." The records bulge with just such invocations by "inferior officials," and former Assistant Attorney General Kramer states that the President: "obviously . . . cannot claim the privilege in all the instances that may arise. This power, like most other presidential powers, therefore must be delegated to other officials." Kramer & Marcuse 911. No mention is made of the point in the Massachusetts case, and a veteran court is unlikely gratuitously to decide a "separation of powers" issue when that can be avoided on the simple ground that the chief executive failed to lodge the privilege claim.

³⁴⁷ Att'y Gen. Memo. 3-4, 48-49. Actual defiance of a statute by the Air Force is hereafter discussed. Kramer & Marcuse 882, say that the privilege "cannot be abrogated by statute."

³⁴⁸ *United States v. Lee*, 106 U.S. 196, 220 (1882). Coke said in 1608 that the King himself was "under . . . the laws." *Prohibitions del Roy*, 12 Co. Rep. 64-65, 77 Eng. Rep. 1342 (1608). See also BOWEN 302-06.

³⁴⁹ See text accompanying note 79 *supra*.

³⁵⁰ See Att'y Gen. Memo. 49; the present provision is in 12 Stat. 387 (1862), 5 U.S.C. § 557 (1958).

visions are likewise found with respect to the Commissioner of Labor (1888)³⁵¹ and the Department of Commerce and Labor (1903).³⁵² So numerous were the various statutory requirements of information from the departments that in 1928 the Congress repealed 127 special items and substituted a blanket provision.³⁵³

It will be instructive to examine recent executive defiance of one such statute. Section 313 of The Act of 1921 directs every department and establishment of the government to furnish to the Comptroller General, the Congressional watchdog, "such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them."³⁵⁴ The papers to which the Comptroller is thereby entitled, said the Attorney General in 1925, "would seem to be a matter solely for his determination."³⁵⁵ Acting under this statute, the Comptroller General requested a report upon the Air Force Ballistics program made by the Inspector General in 1958 to the Secretary of the Air Force.³⁵⁶ The purpose of that report was to "evaluate the management concept" of that program.³⁵⁷ Access to the report was refused,³⁵⁸ not because of the

³⁵¹ 25 Stat. 182, 183 (1888).

³⁵² 32 Stat. 825, 829 (1903). See generally Att'y Gen. Memo. 49.

³⁵³ These items are set forth at 45 Stat. 986-96 (1928). The substitute section,

45 Stat. 996 (1928), 5 U.S.C. § 105a (1958), provided that:

Every executive department and independent establishment of the Government shall, upon request of the Committee on expenditures . . . of the House . . . or upon request of the Committee on expenditures . . . of the Senate . . . furnish any information requested of it relating to any matter within the jurisdiction of said Committee.

Despite its plain language, this provision has been restrictively read by the Attorney General in reliance on legislative history purporting to disclose an intention to require only those matters previously covered by the repealed 127 items. Att'y Gen. Memo. 57-58. It is unnecessary to assay this contention because, if true, Congress can in harmony with precedent enact a sweeping requirement.

³⁵⁴ 42 Stat. 26 (1921), 31 U.S.C. § 54 (1958).

³⁵⁵ 34 Ops. Att'y Gen. 446, 447 (1925).

³⁵⁶ *Moss Hearings* 3578.

³⁵⁷ *Id.* at 3677, 3635.

³⁵⁸ *Id.* at 3573, 3578. After his initial refusal, Secretary Douglas first transmitted a 2 1/2 page "summary" of the report, *id.* at 3582, later a 35-page typewritten "statement of facts contained in the report," *id.* at 2711, and stated that "opinions, conclusions, recommendations, and other advisory matters contained in the report have been omitted . . ." *Id.* at 3711. Two additional "classified" pages also were sent. *Id.* at 3650. The original report consisted of 61 pages, a basic report of 9 pages and supplementary data of 52 pages. *Id.* at 3650.

The Comptroller General replied that this statement was "not an adequate substitute" for the full report, that "some of the 'facts' are actually conclusions," that "to evaluate the facts and determine the reasonableness of these conclusions, additional information is needed," citing several examples. *Id.* at 3579. The Inspector General stated that "the report itself is in the nature of the summary of a great deal of information which was developed in the course of the survey. Literally we developed a 5-foot shelf of information and data So for a thorough

absence of statutory coverage³⁰⁰ nor because of threats to military security,³⁰⁰ but because of a desire to improve "self-criticism."³⁰¹ The Secretary took the position that in order to encourage the confidence of those who divulged information to the Inspector General it was necessary to conceal their identity.³⁰² This was not a miniscule operation; the Inspector General's office employed the services of 3,139 employees³⁰³ and in fiscal 1959 twenty-four million dollars was expended on its operations³⁰⁴—more than is spent on some of the independent agencies. Indisputably, Congress had a legitimate interest before appropriating more moneys for the operation to know whether it was efficiently operated and whether the giant ballistics program itself was being adequately monitored. Indeed, the Inspector General agreed that it was "important to the Congress"

understanding of a survey that the Inspector General has made, it is *necessary* to be *thoroughly conversant* with *all* of this material." *Id.* at 3643. (Emphasis added.) Secretary Douglas said he would not make available "the back-up material that is collected in the investigation." *Id.* at 3699. The Comptroller General testified that: "the denial by any official or organization of information developed in its internal reviews . . . hampers any external review or independent consideration of the effectiveness and efficiency of the activities, or necessitates a duplication of costs in making similar reviews. This is, in itself, an unjustifiable waste of the taxpayers' money." *Id.* at 3580-81. For earlier criticism of this Air Force refusal see Schwartz 38-39.

³⁰⁰ The Air Force Secretary conceded that the statutory powers of the Comptroller General are "so broad that executive privilege is the only possible major exception to them." *Id.* at 3684.

In 1828, the Secretary of War, upon request, furnished confidential reports of the Inspector General of the Army. Collins 572.

³⁰⁰ *Moss Hearings* 3641.

³⁰¹ *Id.* at 3676, 3572. Such a claim has already been rejected in the field of "evidentiary" privilege: "[T]he Government claims a new kind of privilege. Its position is that the proceedings of boards of investigation of the Armed Forces should be privileged in order to allow the free and unhampered *self-criticism* within the service necessary to obtain the maximum efficiency. . . . I can find no recognition in the law of the existence of such a privilege." *Brauner v. United States*, 10 F.R.D. 468, 472 (E.D. Pa. 1950). (Emphasis added.) *Brauner* was reversed in *United States v. Reynolds*, 345 U.S. 1, 11 (1953), but on the ground that no adequate predicate had been laid for disclosure of "military secrets." See also *Clark, C.J.*, concurring in *Bank Line v. United States*, 163 F.2d 133, 139 (2d Cir. 1947).

³⁰² *Moss Hearings* 3660. Note too that the Inspector General's Report was distributed to some 40 persons and offices within the Air Force, *id.* at 3751-52, and that the names of confidential sources were not deleted from copies sent to the commander of the inspected unit. *Id.* at 3638. Consequently, looking to the "evidentiary privilege" analogy, "once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." *Roviano v. United States*, 353 U.S. 53, 60 (1957).

³⁰³ Unpublished letter from Col. Bourke Adkinson to Subcommittee Chairman John E. Moss, July 15, 1959.

As of Jan. 1, 1962, the Federal Maritime Commission had 142 employees; the Civil Aeronautics Board had 776; the Federal Power Commission had 900; and the Federal Trade Commission had 984. Chart of Organization accompanying SEN. REPT. No. 22 of the Senate Committee on Government Operations.

³⁰⁴ Letter, *supra* note 363.

to be assured by "an independent evaluation" that his office "is doing a thoroughly adequate job in its surveys of management concepts."³⁶⁵ The request for the completed report, be it noted, represented no attempt to "control the execution" of a law but rather an attempt *after* completion of an executive function to evaluate performance.

Stated baldly, the Secretary told Congress that effective performance of the delegated duty required him to withhold details of performance. Congress replied, in effect, that even if the job were to be less well done, it must know how it was being done in order to determine whether to transfer, reorganize or abolish the function. Balancing necessities of government, as is essential in weighing conflicting claims of power, the question is whether the alleged executive desire to improve performance—which more than once has served as a screen for incompetence and waste³⁶⁶—shall be permitted to outweigh the congressional duty to ferret out inefficiency and the need to legislate and appropriate intelligently.³⁶⁷ This incident illustrates the lengths to which the claim of privilege has been pushed and the frivolous grounds on which disobedience of a statute has been based, if indeed one ground more than another can be deemed to extenuate the disobedience.³⁶⁸

The unhesitating assumption of the Attorney General and the executive branch that executive privilege rises above compliance with a duly enacted statute constrains me to belabor what seems obvious. This privilege, it will be recalled, was based on the duty "to take care that the laws be faithfully executed." It is a feat of splendid illogic to wring from a duty faithfully to execute the laws a power to defy them; and it runs head on into an early Supreme Court pronouncement: "To contend that the obligation imposed

³⁶⁵ *Moss Hearings* 3654.

³⁶⁶ See notes 30-31 *supra* and text accompanying note 516 *infra*.

³⁶⁷ The Attorney General himself states that "the legislative branch is justly entitled to be properly informed of the activities of the executive branch. Intelligent legislation and the duty of the House and Senate to appropriate money for governmental expenditures, *require access* to information." Then he goes astray: "However, we must not confuse *comity* and reasonableness . . . with the *sometimes asserted right* of the Houses of Congress to all information and papers in the executive branch." Att'y Gen. Memo. 70. (Emphasis added.) In other words, the Congress is "entitled" to see so much of the information which is "required" for legislation and appropriation as the executive by "comity" sees fit to show!

³⁶⁸ Schwartz 40, points out that this "extreme assertion of privilege in the face of a statute was made without the slightest awareness by the President of what was being done. We know that this is true because the President candidly admitted his ignorance of the matter at his November 5, 1958, press conference." The President's "admission" was embarrassed rather than "candid." See *Moss Hearings* 3706-07.

upon the president to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."⁸⁶⁹ Even in the field of foreign relations, where the President exercises the least circumscribed powers,⁸⁷⁰ "it was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an act of Congress."⁸⁷¹

The stiff-necked Jackson, who had been charged with asserting that he was "not bound to carry" into effect a law which "he believed" unconstitutional, said Taney, a member of his Cabinet, "never expressed a doubt as to the duty and obligation upon him in his Executive character to carry into execution any Act of Congress regularly passed, whatever his own opinion might be of the constitutional question."⁸⁷² What!, it may be asked, can Congress coerce

⁸⁶⁹ *Kendall v. United States*, 12 Pet. (37 U.S.) 524, 613 (1838). When the opinion was delivered in open Court it contained a passage which led Attorney-General Butler to rise and say that "it had been stated ["urged at the bar"] that the obligation imposed on the President to see the laws faithfully executed implied a power to forbid their execution. For himself, he disclaimed such a doctrine . . ." and asked the Court to expunge the reference. The Justices said they understood that he had in fact made such a claim, and Justice Wayne stated that he had heard the doctrine "with equal astonishment and indignation. He had not supposed there was any intelligent man in the country so ignorant of the principles of our Government and institutions as to entertain such a principle; much less could he have anticipated that it would ever be advanced before that tribunal by distinguished professional gentlemen." 2 WARREN 320. The opinion was modified, however, in accordance with Butler's request. *Id.* at 320. Earlier it had been said: "The President of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it *would render the execution of the law dependent on his will and pleasure*; which is a doctrine that has not been set up, and will not meet with any supporters in our government." *United States v. Smith*, 27 Fed. Cas. 1192, 1230 (No. 16342) (C.C.N.Y. 1806). (Emphasis added.) Still earlier, in 1794, Mr. Sedgwick said on the floor of the House: "There was, in fact, in no instance an authority given to the Executive to repeal a Constitutional act of the Legislature." 4 ANNALS OF CONG. 570 (1794). Professor Davis concludes that: "Only the courts have authority to take action which runs counter to the expressed will of the legislative body." 3 DAVIS, ADMINISTRATIVE LAW TREATISE 74 (1958).

⁸⁷⁰ *Cf. United States v. Curtiss Wright Export Corp.*, 299 U.S. 304 (1936).

⁸⁷¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring). See also concurring opinion of Frankfurter, J., *id.* at 602. As Mr. Justice Jackson said: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Id.* at 637.

⁸⁷² Quoted in 1 WARREN 763-64. In 1790, Jefferson, then Secretary of State, said: "The Executive, possessing the rights of self government from nature, cannot be controlled in the exercise of them but by a law, passed in the forms of the Constitution." Quoted by Corwin, *The Steel Seizure Case* 53-54. President Theodore Roosevelt was of the same opinion: "Heads of the Executive departments are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution." Quoted in Att'y Gen. Memo. 17. President Polk said of a statute that "it is binding upon all the departments of the Government, and especially upon the Executive, whose duty it is 'to take care that the laws be faithfully executed.'" "

the President by an "unconstitutional" statute? In 1854 Attorney General Cushing advised the President that Congress

cannot pass any law, which, in effect coerces the discretion of the President, except with his approbation, *unless* by concurrent vote of two-thirds of both Houses, upon his previous refusal to sign a bill. . . . If, then, the President approves a law, which imperatively commands a thing to be done, ministerially, by a Head of Department, his approbation of the law, or its repassage after a veto, gives constitutionality to what would otherwise be the usurpation of executive power on the part of Congress.³⁷³

The President may veto a bill on constitutional grounds; but by providing that Congress could then pass it over his veto, the Constitution plainly indicates that the President is bound by that law.³⁷⁴

4 RICHARDSON 432. To be sure, the statute in this case authorized Polk to withhold information, but it would be novel doctrine that would make the "faithfully executed" duty turn on whether it served executive purposes or not.

President Grant, exasperated by an attempt to embarrass him by an inquiry whether he had spent the hot months away from Washington, said that the Constitution placed no limitation as to the place where the President's power shall be exercised, and that were there a restrictive statute: "I should nevertheless recognize the superior authority of the Constitution, and should exercise the powers required thereby of the President." Att'y Gen. Memo. 13. Even if this particular Presidential prerogative can not be restricted by statute, it does not follow that the President may finally determine that an attempted restriction is unconstitutional. That task was left to the courts.

³⁷³ 6 OPS. ATT'Y GEN. 680, 682 (1854). (Emphasis added.) When, therefore, Attorney General Rogers says that "a law which would compel heads of departments to give information and papers to . . . Congress" would, "according to Attorney General Cushing . . . be subversive of our form of Government," Att'y Gen. Memo. 48-49, he perverts Cushing's statements and ignores the fact that Cushing unmistakably regarded existing law requiring department heads to furnish information to Congress as binding. See text accompanying notes 104-05 *supra*.

Attorney General Homer Cummings, referring to the situation where the "Attorney General is asked to pronounce upon the constitutionality of a statute after it has been passed by the Congress and approved by the President," stated in an opinion to the President that: "Both then have evidenced their determination that the measure is constitutional. What before remained in the sphere of debate has now been elevated to the domain of law." SWISHER, SELECTED PAPERS OF HOMER CUMMINGS 276 (1939).

³⁷⁴ "The President is an agent selected by the people, for the express purpose of seeing that the laws of the land are executed. If, upon his own judgment, he *refuses to execute a law and thus nullifies it*, he is *arrogating to himself controlling legislative functions*, and laws have but an advisory, recommendatory character, depending for power upon the good-will of the President. That there is danger that Congress may by a chance majority, or through the influence of sudden great passion, *legislate unwisely or unconstitutionally*, was foreseen by those who framed our form of government, and the provision was drawn that the President might at his discretion use a veto, but this was the entire extent to which he was allowed to go in the exercise of a check upon the legislation. It was expressly provided that if, after his veto, two-thirds of the legislature should again demand that the measure become a law, it should thus be, notwithstanding the objection of the Chief Executive. Surely there is *here left no further constitutional right on the part of the President to hinder the operation of a law*." 3 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1503-04 (2d ed. 1929). (Emphasis added.) Once the veto power has

If in fact the law thus enacted is unconstitutional,³⁷⁶ it is for the courts to decide, the protection the Constitution affords against all usurpations of power. It was a former Attorney General, Mr. Justice Jackson, who said that "with all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."³⁷⁶

* * * *

History, the traditional index of constitutional construction, discloses that a sweeping power of legislative inquiry had been exercised by Parliament and by the colonial legislatures. There is no intimation in the records of the Convention that the executive was to be shielded from the familiar legislative power. The criticism stirred by the express provision for secrecy of the congressional journals rebuts any inference that the less favored executive was given an implied power to keep secret from Congress—the law-maker—whether the laws were being "faithfully executed." The power of inquiry was immediately asserted by the First Congress with the concurrence of President Washington. There is no need to insist that history is conclusive; it suffices that it furnishes a necessary beginning upon which reliance can be placed until there is clear reason for change.

The second installment of this study will assay the practical reasons which have been advanced for such a change, and will also show that the claim of absolute discretion to withhold from Congress far exceeds the limited privilege given recognition by the courts in private litigation. Inasmuch as claims of absolute power are out of favor, and since neither disputant should be permitted

been exercised, "this power of self-defense is at an end; and once a statute has been duly enacted, whether over his protest or with his approval, he [the President] must promote its enforcement" CORWIN 66.

³⁷⁵ Attorney General Homer Cummings found "grave objections" to the rendition of opinions upon request from agency heads respecting "the constitutionality of laws they have been appointed to administer," saying: "There is no warrant for such requests as the *presumption of validity is binding* upon them and they must act accordingly." SWISHER, *op. cit. supra* note 373, at 274. (Emphasis added.) In another opinion, Attorney General Cummings said that: "The constitution has vested in no . . . officer the power to remove an enactment of the Congress from the statute books upon the ground of its invalidity." 38 OPS. ATT'Y GEN. 252, 257 (1935). "[C]onsideration for the orderly, efficient functioning of the processes of government," it was said in *Panitz v. District of Columbia*, 112 F.2d 39, 42 (D.C. Cir. 1940), "makes it impossible to recognize in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the constitution."

³⁷⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (concurring opinion).

finally to draw boundaries which encroach on the claimed powers of the other, the concluding portion of the second installment will consider whether the courts may take jurisdiction of the dispute. That issue will be examined from three aspects: (1) does the dispute give rise to a "case or controversy"; (2) would either branch have "standing to sue"; and (3) does the dispute involve a non-justiciable "political question."[†]

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EXECUTIVE PRIVILEGE V. CONGRESSIONAL INQUIRY

Raoul Berger*

PART II

Resistance to the congressional claim to unlimited information from the executive branch presents a dispute about constitutional boundaries. Ascertainable boundaries between the branches are a basic presupposition of the separation of powers, and Part I of this study conned the pages of history in a search for boundaries that obtained at the adoption of the Constitution. Parliamentary and colonial legislative inquiries, it was there concluded, were virtually unlimited,[†] and the Framers gave no evidence of an intention to confer executive power to withhold information from Congress. Instead of assuming that history was conclusive in the process of constitutional interpretation, Part I posited minimally that it became incumbent upon executive privilege adherents to show that exigencies of an expanding, changing nation required a departure from historical practices.

Part II now assays the practical reasons which have been advanced for a restrictive view of the inquiry power. Then, because conflicting constitutional boundary claims ought to be submitted to impartial arbitrament, and because it is traditionally the function of the courts to draw constitutional boundaries, there follows inquiry into whether constitutional obstacles to judicial resolution of the dispute exist.

VII. EXECUTIVE PRIVILEGE COMPARED WITH EVIDENTIARY PRIVILEGE

It is paradoxical that the claim of "uncontrolled" discretion to withhold information from Congress should first have been asserted

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The volume of citations makes it necessary to employ abbreviations for frequently cited authorities. See Appendix for key.

† In addition to the materials cited in Part I at pps. 1056-1060, note that in 1774, James Wilson, who later played a prominent role in the Constitutional Convention, stated that the House of Commons "have checked the progress of arbitrary power, and have supported with honour to themselves, and with advantage to the nation, the character of grand inquisitors of the realm. The proudest ministers of the proudest monarchs have trembled at their censures; and have appeared at the bar of the house, to give an account of their conduct, and ask pardon for their faults." *On the Legislative Authority of the British Parliament*, reprinted in 3 WILSON, WORKS 203, 219 (1804).

after a claim of absolute discretion to withhold military secrets from a private litigant had been categorically rejected. If the law were as privilege adherents would have it, a private litigant would enjoy greater rights to information than does Congress, and this although President Tyler, summarizing the first sixty-five years of experience, pushed the claimed executive privilege no further than the recognized categories of "evidentiary" privilege. Before summarizing those categories it will be useful to pull together the threads of the several claims to privilege against the Congress.

A. *Executive Privilege*

After an extended survey, a recent protagonist of executive privilege, Mr. Younger, categorized the various claims of privilege as follows:

- (1) A house of Congress or Congress as a whole has no power to legislate on the particular matter.³⁷⁷
- (2) foreign affairs require the withholding of certain information;
- (3) the innocent must be protected;
- (4) the identity of sources of confidential information should not be disclosed;
- (5) administrative efficiency requires secrecy. The warp and woof are perfect; there is no gap.

Any exigency will justify withholding from Congress.³⁷⁸

The fifth claim was first asserted by President Eisenhower in defense of the Army against Senator McCarthy, and it may confidently be asserted that it is without historical justification. President Jackson's refusal to reveal a statement he made *to his Cabinet*³⁷⁹ is a remote analogy, because such confidential communications—what Marshall labelled "secrets of the cabinet"³⁸⁰—are poles apart from an unlimited discretion to withhold any document or communications between the several million subordinate employees in the interest of

³⁷⁷ Younger 773. He instances Washington's refusal of information to the House respecting the Jay Treaty; the information had been given to the Senate. See text accompanying note 224 *supra*. Mr. Younger swallows whole the assumption that the President may finally determine the scope of Congress' powers when he is at most empowered to make an initial and not binding determination of his own powers, as is immediately apparent from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the "Steel Seizure" case. Just as "an agency may not finally decide the limits of its statutory power. That is a judicial function," *Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946), so was that power withheld from the President. See also text accompanying notes 179-83, 325 *supra*.

³⁷⁸ Younger 773.

³⁷⁹ Younger 772-73.

³⁸⁰ *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 170 (1803).

"administrative efficiency."³⁸¹ Messrs. Kramer and Marcuse proffer a different rationale. Noting congressional proneness to defer to privilege in foreign relations as distinguished from Presidential protection of "the internal integrity and efficiency of the Executive establishment,"³⁸² they conclude that "it may be doubted whether there is a qualitative difference between the President's powers when he acts as the principal organ in the field of foreign relations . . . and when he takes 'care that the Laws be faithfully executed'"³⁸³ If the test of secrecy be protection of the public interest, then an alleged need, for example, to shield British-American military negotiations for defense against Russia, surely cannot be equated with the "need" for insulation of an Inspector General's report so that "self-criticism" and "efficiency" may be promoted.³⁸⁴ The two are incommensurable. An assumption that information may be concealed from Congress on the plea of "administrative efficiency" would have shielded Fall, Denby and Daugherty from congressional investigation and have enabled them to despoil the nation of Teapot Dome, and all in the guise of taking "care that the Laws be faithfully executed"! If Congress is to inquire whether a given operation is "efficient," as the cases, applying historical precedent, hold it is authorized to do, it cannot be left to the executive to determine that "efficiency" forecloses scrutiny. When the executive branch proceeded on the contrary premise during the Eisenhower Administration, it produced some withholdings that bordered on the grotesque, as will hereafter appear.

But, to go back a step, it is a mistake to posit insulation for foreign affairs in the first place, for such insulation simply does not square with historical fact. William Pitt, it will be recalled, mordantly rejected the claim that state secrets must be shielded from Parlia-

³⁸¹ Judge Wyzanski stated that: "Where the secret is known only to the President and his Cabinet . . . it is arguable that the privilege . . . can be released only by the President, or with his consent. . . . Where the secret is known to a lesser official the privilege probably belongs to the nation as a whole. It can certainly be released by a statute of Congress. Probably it can be released by one house acting alone or by a committee, since secrets of that lower dignity are often released by action of a subordinate executive officer and hence ought to be releasable by a member of Congress." Wyzanski 99. The personal relation between President and Cabinet may demand protection that does not extend to lesser officials. In another context, arguing for the President's power summarily to dismiss Cabinet officers, Professor Bickel states the broadening of the President's "personal political responsibility . . . demands a special kind of loyalty and responsiveness in his immediate subordinates. But it is not arguable on principle that the security of the nation will be best served if all employees of the Government . . . can be dismissed on whim or hunch." Bickel 76.

³⁸² Kramer & Marcuse 902.

³⁸³ *Ibid.*

³⁸⁴ "A survey of economic conditions . . . is hardly to be classed with secret minutes of diplomatic conferences or military plans." TAYLOR 99.

ment in the interest of security.³⁸⁵ And if Parliament was momentarily thwarted by George II, the Continental Congress adopted Pitt's view and expressly provided for legislative access to *all* papers in the Department of Foreign Affairs, even those of a "secret nature."³⁸⁶ Washington's Message respecting the Jay Treaty, after stressing the occasional need for secrecy in "foreign negotiations," concluded that this was the reason for confining such information "to a small number of members" (*i.e.*, to the Senate) through the medium of the advice and consent clause. Here was a treaty clamorously assailed by the public, and yet Washington felt constrained to put the "secret" information before the Senate, disclaiming any "disposition" (claim of privilege) to withhold any information that either House had a "right" to require.³⁸⁷ His turn-over to the Senate, while denying the "right" of the House to treaty information, constitutes recognition of the Senate's *right* to it. Vice-President Adams was of the opinion that the House too had a right to the information.³⁸⁸ This is scarcely stuff from which to fashion a wholesale claim of executive privilege.³⁸⁹ Even for foreign negotiations "secrecy" may be too dearly bought; as that seasoned observer, Sir W. Ivor Jennings, noted:

Negotiations with foreign powers are difficult to conduct when a lynx-eyed Opposition sits suspiciously on the watch. We might have a better foreign policy if we had no Parliament: but we might have a worse. . . . We are a free people because we can criticize freely.³⁹⁰

And effective criticism can proceed only from full information.

The "protection of the innocent," another of Mr. Younger's categories, was first assigned by Jefferson as a basis for withholding in the prosecution of Aaron Burr.³⁹¹ One who studies Senator McCarthy's perversion of congressional investigations³⁹² is likely to be sympathetic to Jefferson's prophetic assertion of the need to screen "rumors, conjectures, and suspicions" and his conclusion that

³⁸⁵ See text accompanying note 210 *supra*. Earlier Coke had said that: "reason of state is often a trick to put us out of the right way, for when a man can give no reason for a thing, then he flieth to a higher strain and saith it is a reason of state." Quoted in BOWEN 436.

³⁸⁶ See text accompanying note 72 *supra*.

³⁸⁷ See text accompanying notes 224-25 *supra*.

³⁸⁸ See text accompanying note 222 *supra*.

³⁸⁹ The scales are not turned by the several recent individual expressions in Congress to the effect that the President has a right to withhold information respecting foreign relations, KRAMER & MARCUSE 846, 902, for such remarks do not represent the considered judgment of either house and depart from the repeatedly reaffirmed earlier position to the contrary.

³⁹⁰ JENNINGS, *THE BRITISH CONSTITUTION* 82 (3rd ed. 1950).

³⁹¹ Att'y Gen. Memo. 6.

³⁹² BARTH 40-66; TAYLOR 112-35.

"neither safety nor justice will permit exposing of names."³⁰³ But here we are examining the historic basis of a claimed power; what *is*, not what ought to be.³⁰⁴ On this score the fact is that Jefferson's action was at war with his words, that he yielded to Marshall's subpoena and withheld nothing. Marshall left no doubt that the President's judgment whether the public interest required withholding was not conclusive on a court in private litigation,³⁰⁵ and it needs to be asked why it should be more binding on Congress.

From these roots, plus protection for "informers," the argument for withholding "confidential" reports is derived.³⁰⁶ The claim of privilege for communications between subordinates and superiors or between subordinates themselves is of recent vintage, apparently first arising in 1954 out of President Eisenhower's recoil from the McCarthy inquiry into the Army.³⁰⁷ As a recent graft upon the privilege doctrine, this group is best examined against a backdrop of practicalities and evidentiary privilege in private litigation.³⁰⁸ At the same time we should be alert to what Professor Wade, an acute observer of the English administrative scene, calls the "civil servant's occupational love of secrecy," the "official instinct of hiding as much as possible from the public gaze."³⁰⁹ He reports that:

³⁰³ Att'y Gen. Memo. 6. President Tyler remarked that "malignity may seek to make the executive department the means of incalculable and irremediable injury to innocent parties by throwing into them libels most foul and atrocious." *Id.* at 10.

³⁰⁴ See text accompanying note 273 *supra* and note 577 *infra*.

³⁰⁵ See text accompanying notes 332-41 *supra*.

³⁰⁶ Att'y Gen. Memo. 10, 22. President Hoover stated of one category that, "if these matters cannot be treated confidentially by the representatives of the Government who obtain this information from manufacturers, producers and tradesmen, then of course, we will never get the information." Quoted in Younger 766. But Congress as the lawmaker equally interested in law enforcement is entitled to determine whether this need for confidential information rises above its own needs.

The "basic and seemingly irrefutable argument," say Kramer & Marcuse 912, is that of President Theodore Roosevelt: "'Some of these facts . . . were given to the Government under the seal of secrecy . . . and I will see to it that the word of *The Government is kept sacred.*'" Quoted in Att'y Gen. Memo. 17. But the Constitution did not cast the President in the role of Protector of the People against the Congress. On Roosevelt's theory, promises of confidential treatment to "informers" should be equally "sacred," yet that is not the case. See notes 438-442 *infra*.

³⁰⁷ President Eisenhower's directive of May 17, 1954, stated in part that "it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, . . . it is not in the public interest that any of their conversations and communications . . . concerning such advice be disclosed. . . ." Quoted in Kramer & Marcuse 683.

³⁰⁸ See text accompanying notes 491-52 *infra*.

³⁰⁹ WADE 16. See *id.* at 245. On Oct. 28, 1963, Senator Long of Missouri opened the hearings of a Senate subcommittee on a proposed amendment to § 3 of the Administrative Procedure Act with the remark that "the tendency [of officialdom] toward secrecy must be checked now." Hearings 3. See note 491 *infra*.

Mr. Justice Devlin said that Crown privilege was becoming a serious obstruction to justice, and both he and the Court of Appeal were clearly convinced that privilege was being claimed for documents which could be made available without the least damage to the public interest. As we shall see, this has now been officially admitted.⁴⁰⁰

Such claims have been made by American officialdom even against the Congress.⁴⁰¹ But in private litigation the bureaucracy has met with scant success.

B. *Evidentiary Privilege*

Tyler's invocation of the evidentiary privilege analogy was immediately rebutted by a House committee on the ground, first, that disclosure to Congress did not necessarily result in the publication attendant upon disclosure in a judicial proceeding, and second, that although the public interest in withholding may rise above that of a particular litigant—Chief Justice Marshall held to the contrary in the Burr case—the need for investigation of “abuses in the administration itself” rises higher than the privilege lest that function be defeated.⁴⁰² It would be anomalous to conclude that Congress may compel executive disclosure in private litigation by consenting to suit against the United States,⁴⁰³ that it can waive the privilege of withholding “state secrets” from such litigants⁴⁰⁴ and yet that it is powerless to protect the nation by requiring disclosure to itself. In reference to private litigation, the Supreme Court has said that “judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”⁴⁰⁵ Why should an executive determination be more conclusive against Congress when it requires information as a preliminary to legislation or appropriation? True, thus far the only sanction for nondisclosure in private litigation has been a choice between producing information or losing the action; the government has not actually been *compelled* to produce infor-

⁴⁰⁰ WARE 243. “It has several times happened that evidence for which the Crown at first claimed privilege has since been produced in court and shown to be quite innocuous. [This,] together with repeated judicial criticism of the Crown's use of its powers,” *id.* at 245, led the government to adopt “a self-denying ordinance” making some types of reports available that had earlier been withheld. *Ibid.*

⁴⁰¹ See text accompanying notes 496-530 *infra*.

⁴⁰² See text accompanying notes 286-88 *supra*. Compare the statement by Assistant Attorney General Norbert A. Schlei before a Senate Subcommittee, *supra* note 6, at 198: “The situation in which an individual comes to an agency for particular information relating to a specific case of rule-making for adjudication may be very different from the situation where Congress, in the performance of its constitutionally-assigned functions, is investigating broad areas of governmental activity.”

⁴⁰³ Berger & Krash 1459.

⁴⁰⁴ Halpern v. United States, 258 F.2d 36, 43 (2d Cir. 1958).

⁴⁰⁵ United States v. Reynolds, 345 U.S. 1, 9-10 (1953).

mation,⁴⁰⁶ because a party who obtains judgment has little need to press on for disclosure. When an administrator is faced with a choice between disclosure or defeat, particularly when the financial stakes are high, there will be few instances in which he will deem nondisclosure more important than victory. Were it established that Congress has a right to demand information from the executive branch, that the latter does not enjoy uncontrolled discretion to withhold such information, and that the courts are empowered to determine conflicting claims of power between Congress and the executive, judicial compulsion would be at hand to enforce the law in this as in many other situations where compulsion has been exercised against administrators and department heads.⁴⁰⁷

Before inquiring into the scope of executive privilege vis-à-vis the Congress, let us therefore turn with President Tyler to the cases in which claims of executive privilege have been asserted in private litigation. The treatment of evidentiary privilege in those cases should illuminate the claimed privilege of nondisclosure to Congress, though it should be emphasized, as the House committee insisted in 1843, that other considerations cause the congressional right to disclosure to rise above the claims of private litigants. For present purposes, a rather cursory survey of the several categories of evidentiary privilege must suffice.⁴⁰⁸

First, however, an enlightening glimpse of the state of English law in 1789. In an admiralty case involving a seizure by British authorities of lumber of American origin, the importation of which was forbidden by statute, the shipowner claimed that he had vainly sought to obtain a copy of an order of council (and of relevant documents) which had suspended the statute. The court found it unnecessary to decide the issue, but said in passing that:

In any cause where the crown is a party, it is to be observed, that the crown can no more withhold evidence of documents in its possession, than a private person. If the court thinks proper to order the production of any public instrument, that order must be obeyed.⁴⁰⁹

The sanction for refusal to produce was that the recalcitrant "shall take nothing by his petition." Such an "order of council," issued in the prosecution of a hard-fought war comes close to being a "state secret;" yet the English court experienced no qualms and took mandatory disclosure for granted, thereby indicating that an absolute privilege for government documents was then judicially undreamed of.

⁴⁰⁶ Bishop 483.

⁴⁰⁷ See text accompanying notes 324-30.

⁴⁰⁸ For more extended discussion see 8 WIGMORE §§ 2374-79; Carrow; Hardin; Taubeneck & Sexton.

⁴⁰⁹ The Ship Columbus, 1 COLLECTANEA JURIDICA 88, 92, 121 (1789).

1. Secrets of State—Military and Foreign Affairs

There are statements from which it might be inferred that in the area of military and foreign affairs an absolute privilege of nondisclosure exists.⁴¹⁰ These statements, however, require reevaluation in light of recent developments.

(a) Military Secrets. The government's claim for protection of military secrets once led to summary rejection of a plea for disclosure.⁴¹¹ But, the Supreme Court held in *United States v. Reynolds*, that such claims are not conclusive on the court, saying that "the court itself must determine whether the circumstances are appropriate for the claim of privilege."⁴¹² In that case the widows of civilian passengers on a crashed military plane which carried secret electronic equipment sought discovery of the Air Force's investigation report. Discovery was denied because plaintiff's had made "dubious showing of necessity" in light of an "available alternative."⁴¹³ The Court also indicated that on occasion it may be possible to satisfy the court that "there is a reasonable danger that the compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged," in which case a court should not insist upon examination even *in camera*.⁴¹⁴ But,

⁴¹⁰ *Dayton v. Dulles*, 254 F.2d 71, 77 (D.C. Cir. 1957), *rev'd on other grounds*, 357 U.S. 144 (1958); 8 WIGMORE § 2378, at 794.

⁴¹¹ See, e.g., *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 Fed. 353 (E.D. Pa. 1912).

⁴¹² 345 U.S. 1, 8 (1953). Such scrutiny is the more essential because, as a former General Counsel of the Army remarks, "there is not much information in the files of the State and Defense Departments—of a sort likely to attract congressional interest—which could not with some plausibility be given a security classification, if the executive wished to withhold it on that ground [or on any ground]." Bishop 487.

⁴¹³ 345 U.S. at 11.

⁴¹⁴ *Id.* at 10. This departs from the rule laid down by Marshall in the *Burr* case, see text accompanying note 340 *supra*. Although *Burr* was a criminal case, Marshall considered that his rule reflected the rule in a civil case. See note 341 *supra*.

For criticism of the *Reynolds* case see Hardin 893-97. The major flaw is that it leaves the decision in borderline cases to the executive, which in practice means petty officials, see note 416 *infra*, who suffer from an occupational infatuation with secrecy, see note 399 *supra*, and accompanying text. See also Hardin 883.

For documentation that the executive branch is uncooperative, see *id.* at 881-87. In the wake of the *Reynolds* case, "the executive continues to withhold from court inspection much that could not be classed as military secrets," *id.* at 896; and Professor Hardin states that: "Without being unduly cynical, one can surmise that in many of the cases the information is really being withheld in order to gain advantage in the suit or to avoid official embarrassment or simply to avoid troublesome interruption of bureaucratic routine." *Id.* at 884. Except in the case of the giant corporation which can litigate on equal terms, officials can wear the average litigant down by resort to protracted litigation to determine whether the litigant is "entitled" to the information. *Id.* at 897.

Unsatisfactory as is the *Reynolds* formula, it yet makes clear that the executive does not have the last word except for the extraordinary case where the court itself is satisfied that national security demands that information should not even be

the Court emphasized, privilege "is not to be lightly invoked . . . [the claim must be] lodged by the head of the department . . . after actual personal consideration by that officer."⁴¹⁵

Presumably the department head's consideration was meant as a substitute for judicial scrutiny in critical areas; but reliance upon "actual personal consideration" by the Secretary of the Army of the various calls for information by private litigants is unrealistic. It is generally agreed that the flood of major matters that vie for the consideration of the head of a department must constrain him to thrust aside such relatively unimportant calls.⁴¹⁶ Then too, as Judge Maris stated for the court below, there is no

danger to the public interest in submitting the question of privilege to the decision of the courts. The judges . . . are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments.⁴¹⁷

No branch has enjoyed greater confidence of the American people than the judiciary and it is singular that there should be any qualms

divulged to the court. Note that in *Jencks v. United States*, 353 U.S. 657, 669 (1957), a criminal case, the Court said that "the practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved."

⁴¹⁵ 345 U.S. at 7-8.

⁴¹⁶ See discussion at notes 539-44 *infra*; McCORMICK, EVIDENCE 307 (1954); 8 WIGMORE § 2378, at 793.

After calling attention to a particularly harsh refusal to exercise the Attorney General's discretion to release a deportable alien on bond because a "very subordinate official . . . (not the Attorney General himself) said that Zydok's [the alien] dossier showed involvement with the Communists" though "there was no disclosed evidence of subversive activities," GELLIORN & BYSE 819-20, point out that "the Attorney General's judgment is rarely brought to bear on these matters, or, indeed, on any other individual cases in the deportation process." This was confirmed by Mr. Justice Black in *Jay v. Boyd*, 351 U.S. 345, 366 (1956) (dissenting opinion): "The Court concedes . . . that the Attorney General does not personally exercise discretion in these cases. Therefore, the 'unfettered discretion' . . . is the unfettered discretion of inquiry officers . . ." Mr. Justice Jackson, concurring in *McGrath v. Kristensen*, 340 U.S. 162, 176 (1950), rejected a "foggy" opinion of the Attorney General rendered by him to Secretary of War Stimson, saying that "it would be charitable to assume" that "the *nominal* author of the Opinion [did not] read it." *Id.* at 163. (Emphasis added.) If this could be true of so important a matter as a formal opinion of the Attorney General to a department head, why should more be expected when the issue is whether to make documentary disclosure in a civil litigation?

⁴¹⁷ *Reynolds v. United States*, 192 F.2d 987, 997 (3d Cir. 1951). Judge Maris' views were adopted by the dissenters, Black, Frankfurter and Jackson, JJ., in *United States v. Reynolds*, 345 U.S. 1, 12 (1953). The sweeping effect given in England to a ministerial representation that disclosure in a private litigation will injure the national interest, *Duncan v. Cammell Laird & Co.* [1942] A.C. 624, has been rejected by the highest courts of Canada and New Zealand, and subjected to searching criticism. See Note, *The Authority of Duncan v. Cammell Laird & Co.*, 79 L.Q. REV. 153 (1963) (A. L. Goodhart), which also notes judicial expressions of "concern lest claims of privilege were being too widely asserted." *Id.* at 155. See text accompanying note 400 *supra*.

about permitting the courts to screen administrative claims of the need for secrecy. Wigmore justifiably asked, "is it to be said that even this much of disclosure [*in camera*] cannot be trusted? Shall every subordinate in the department have access to the secret, and not the presiding officer of justice?" To leave the final determination in bureaucratic hands, he continues, is to furnish to governmental officials

too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege.⁴¹⁸

Wigmore's forebodings were abundantly fulfilled by the executive branch under the 1954 Eisenhower directive to withhold information from Congress. It should be borne in mind that *Reynolds* is confined to civil cases in which the government defends; the requirement of disclosure in criminal cases is recognized.⁴¹⁹

Totten v. United States,⁴²⁰ the post-Civil War case where suit was brought for espionage services under a secret contract between the spy and President Lincoln, is sometimes cited mistakenly for executive privilege. The Court said that the "*existence of a contract of that kind is itself not to be disclosed*,"⁴²¹ meaning that an implicit

⁴¹⁸ 8 WIGMORE § 2389, at 799 (3d ed. 1940). Not "every subordinate" has access to military secrets, but subordinates undeniably do handle them and consult tiers of superiors. This has received judicial recognition. Matters of "rarest secrecy" must often be duplicated by subordinates and thus become "known to one or more stenographers or file clerks or photographers or other craftsmen and likely as not to others." *United States v. Certain Parcels of Land*, 15 F.R.D. 224, 232 (S.D. Cal. 1954). Obviously the Secretary cannot himself keep "state secrets" under lock and key. And occasionally, as we learn from time to time, subordinates leak such secrets to hostile nations. Moreover, today, "hundreds of thousands of civilians are engaged in secret activities of the greatest military importance, whether at military laboratories such as Fort Monmouth or civilian agencies like the Atomic Energy Commission . . . [not to mention the numerous subcontractors] . . ." TAYLOR 107. Compare Judge Wyzanski's remarks, note 381 *supra*; and the claim of secrecy made against the House for papers that could be seen in the Senate. See text accompanying notes 238-39 *supra*.

⁴¹⁹ "The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privilege to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on the terms to which it has consented." *United States v. Reynolds*, 345 U.S. 1, 12 (1953). And "the rationale of the criminal cases" is no less applicable to civil suits brought by the government. Apparently the Court overlooked the impact of the Federal Rules of Civil Procedure on the government as defendant. Once there has been "consent" to suit, the government is as much bound by the Rules as a private litigant, including the discovery provisions, which are applicable to both plaintiffs and defendants. *Berger & Krash* 1451, 1454-55.

⁴²⁰ 92 U.S. 105 (1875).

⁴²¹ *Id.* at 107. (Emphasis added.)

term of the contract was nondisclosure of its existence. Thus the opinion turned primarily "on the breach of contract which the Court found occurred by the very bringing of the action."⁴²²

A post-*Reynolds* case that underscores the need for judicial scrutiny of privilege claims for military secrets is *Halpern v. United States*.⁴²³ The statute authorized withholding of a patent if the government believed secrecy was required in the national interest but afforded a right to compensation. In 1941, Halpern disclosed to the government a discovery with important military implications whereby "an object may escape observation or detection by radar." This was reduced to practice and improved, and Halpern filed a patent application. His patent was withheld, though deemed otherwise allowable, because as late as 1956 the Commissioner of Patents found secrecy essential. Compensation was denied by the administrators whereupon Halpern filed suit and was met among other things by a plea of privilege for "state secrets."⁴²⁴ Recovery for the secret he himself had divulged was opposed because the secret had to be preserved! The Second Circuit rejected this claim saying, first, that there could be a trial *in camera* and, second, that

the scope of the privilege of the United States with respect to state secrets, like its similar privilege to withhold the identity of confidential informants, 'is limited by its underlying purpose. . . .' [T]he privilege relating to state secrets is inapplicable when disclosure to court personnel in an *in camera* proceeding will not make the information public or endanger the national security.⁴²⁵

The court's practical suggestions for dealing with the *in camera* trial⁴²⁶ constitute a refreshing departure from the hypnotic incantation of "state secrets."

(b) Foreign Affairs Secrets. There is no more reason to conclude that the privilege for "foreign affairs" is absolute than in the case of "military secrets". Wigmore cites *United States v. Burr* for "recognition of privilege" for correspondence which "might have involved international relations with Spain and France."⁴²⁷ At an

⁴²² *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958).

⁴²³ *Ibid.*

⁴²⁴ See Coke's comment on the "state secret" defense, note 385 *supra*.

⁴²⁵ 258 F.2d at 44. The court stated that a trial *in camera* should be had if it "can be held without running any serious risk of divulgence of military secrets," *id.* at 435, but it would appear that the court regarded the risk as negligible. Cf. note 426 *infra*.

⁴²⁶ "It should not be difficult to obtain a court reporter and other essential court personnel with the necessary security clearance. If necessary, the stenographers who are now writing letters concerning this invention [and often handling and filing the "secrets"] for the Department of the Navy can be utilized to record the testimony." 258 F.2d at 43.

⁴²⁷ 8 WIGMORE § 2378, at 785 n.6 (3d ed. 1940), citing *United States v. Burr*, 25

early stage of the proceeding Chief Justice Marshall, referring to an *answer* to General Wilkinson's letter, said

the propriety of requiring the answer to this letter is more questionable. It is alleged that it most probably communicates orders showing the situation of this country with Spain. . . . *If it contain matter not essential to the defence, and the disclosure be unpleasant to the executive, it certainly ought not to be disclosed.* This is a point which will appear on the return.⁴²⁸

No further mention of this letter is made, and from the government attorney's later statement to the court that "when we receive General Wilkinson's letter, the return will be complete," it may be inferred that this answer was not withheld.⁴²⁹

A recent case, *Dayton v. Dulles*, did however declare that withholding was permissible where

disclosure would adversely affect our internal security or the conduct of our foreign affairs. The cases and common sense hold that the courts cannot compel the Secretary to disclose information garnered by him in confidence in this area.⁴³⁰

Plaintiff sought a passport to India in order to accept a position as research physicist at the University of Bombay. The Secretary of State denied the passport on the basis of confidential information that plaintiff had been a member of the Rosenberg ring and was going abroad to advance the Communist cause. He stated in the course of the trial that it would be detrimental to internal security⁴³¹ and to our foreign relations to disclose the source of his information. In affirming the denial, Judge Prettyman relied on *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*,⁴³² which held that an order of the President approving an order of the Civil Aeronautics Board which denied an overseas route was unreviewable. He quoted a statement by Mr. Justice Jackson that:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would

Fed. Cas. 30 (No. 14692d) (C.C.D. Va. 1807). But note that Wigmore concedes the necessity for secrecy only "for acts of pending international negotiations or military precautions against foreign enemies," and even here he insists that courts should determine whether secrecy is necessary. 8 WIGMORE 789, 799.

⁴²⁸ 25 Fed. Cas. at 37. (Emphasis added.)

⁴²⁹ See note 333 *supra*. Marshall's subsequent opinion was confined to General Wilkinson's letter. 25 Fed. Cas. at 190-93.

For a turn-over of "confidential information" by Washington, even with respect to pending negotiations, see text accompanying notes 240-47 *supra*.

⁴³⁰ 254 F.2d 71, 77 (D.C. Cir.), *rev'd*, 357 U.S. 144 (1958), on the ground that the action was not authorized either by Congress or the President.

⁴³¹ 254 F.2d at 72-74.

⁴³² 333 U.S. 103, 111 (1948).

be intolerable that the courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.⁴³³

Presumably this pronouncement would not shield such information in a criminal case under *United States v. Jencks*,⁴³⁴ and *United States v. Reynolds*.⁴³⁵ Even in a civil case the President's role as Commander-in-Chief does not under the *Reynolds* case afford "military secrets" an absolute shield from disclosure.⁴³⁶ It is difficult to conceive of any matter touching foreign relations which today requires greater secrecy than the Polaris missile or nuclear armament programs, the secrecy of which is being preserved even at the cost of impaired "foreign relations" with General De Gaulle.⁴³⁷ Yet even as to these a court must be satisfied that disclosure will threaten the national security.

2. Informers

The "informer's privilege" is in reality the government's privilege to withhold the identity of informers in order to encourage them to communicate information of law violations to enforcement officers. But it is not an immutable privilege: "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."⁴³⁸

⁴³³ Quoted 254 F.2d at 75.

⁴³⁴ 353 U.S. 657 (1957).

⁴³⁵ See note 419 *supra*.

⁴³⁶ See note 412 *supra*.

In *Republic of China v. National Union Fire Ins. Co.*, 142 F. Supp. 551 (D. Md. 1956), the government refused to "supply any memoranda of certain conversations between the American and British representatives" because it "would be prejudicial to the foreign relations." *Id.* at 553. The court said: "Here, as in the *Reynolds* case, the necessity for disclosure of the information requested is dubious and the reason for sustaining the claim of privilege is clear." *Id.* at 557.

⁴³⁷ The effect of *Dayton v. Dulles* needs to be considered further in light of *Greene v. McElroy*, 360 U.S. 474 (1959), which is hereafter discussed.

Mr. Justice Jackson, upon whose opinion in the *Waterman* case Judge Prettyman strongly relies, said in a later case in which the government claimed that "security" required the withholding of "confidential information," that "security is like liberty in that many are the crimes committed in its name." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (dissenting; Black and Frankfurter JJ., concurred.)

Whatever the impact of *Waterman* on "evidentiary privilege," a statute requiring disclosure to Congress would stand on a different footing. Mr. Justice Jackson himself regarded *Waterman* as an example of "wide definition of presidential powers under statutory authorization"; the earlier *Curtiss-Wright*, he said, did not intimate that the President "might act contrary to an Act of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 n.2 (1952) (concurring opinion).

⁴³⁸ *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). Earlier it had been held that the informer's privilege must give way: "If what is asked is useful evidence

The argument that disclosure will "dry up sources" of information has been subjected to trenchant criticism,⁴³⁹ and in clinging to the remnants of the "informer's privilege" we need to bear in mind Mr. Justice Jackson's observation:

The plea that evidence of guilt [for exclusion of immigrants] must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.⁴⁴⁰

Even FBI informers have from time to time proven unreliable;⁴⁴¹ and government reliance on "confidential information" as a basis for administrative action has recently been badly shaken by *Greene v. McElroy*.⁴⁴² Since *Greene*, liberalizing influence has been making itself felt. So, in a recent case involving a claim of anonymity for employees who complained to the government of their employers, the court said that the purpose of the informer's privilege is "to make retaliation impossible," but that the rule is not automatic and even the desire for protection may be outweighed by the need for information in a given case.⁴⁴³ A further step was taken in *Gonzalez v. Freeman*:

to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled." *Wilson v. United States*, 59 F.2d 390, 392 (3d Cir. 1932). *Roviano* adds that: "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U.S. at 62.

⁴³⁹ McKay 151-52.

⁴⁴⁰ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (dissenting; Black and Frankfurter, JJ., concurred). Again, in *United States v. Nugent*, 346 U.S. 1, 13 (1953), Justices Douglas and Black, dissenting, said that "the use of statements by informers who need not confront the person under investigation or accusation has such an infamous history that it should be rooted out from our procedure."

⁴⁴¹ Mr. Justice Frankfurter alluded in his memorandum in *Mesarosh v. United States*, 352 U.S. 808, 811 (1956), to a "statement by the Government that it 'now has serious reason to doubt' testimony given in other proceedings by Mazzei, one of its specialists on Communist activities. . . ." And he stated in *Jay v. Boyd*, 351 U.S. 345, 373 (1956) (dissenting opinion), that "we can take judicial notice of the fact that in conspicuous instances, not negligible in number, such 'confidential information' has turned out to be either baseless or false. There is no reason to believe that only these conspicuous instances illustrate the hazards inherent in taking action affecting the lives of fellow men on the basis of such information. The probabilities are to the contrary." Professor McKay has furnished citations for still other "indications of unreliability on the part of an appreciable number of regularly employed informants who were apparently regarded by the FBI as 'sources known to be reliable.'" McKay 152. *Cf. BARTH* 84-90.

⁴⁴² 360 U.S. 474 (1959), discussed *infra* text accompanying notes 456-69.

⁴⁴³ *Wirtz v. Continental Fin. & Loan Co.*, 326 F.2d 561, 563-64 (5th Cir. 1964). See also *Wirtz v. Hooper-Holmes Bureau, Inc.*, 327 F.2d 939 (5th Cir. 1964).

Where no significant security interests would be jeopardized by disclosure of sources of adverse information, it is difficult to justify withholding sources of whatever information is relied upon for administrative decision.⁴⁴⁴

3. Confidential Information

Confidential information may be categorized roughly as that procured by governmental investigation and that turned over on a statutory guarantee of confidential treatment.

(a) Investigation Reports. No investigation reports have been more tenderly regarded than those of the FBI. Yet even FBI reports have been denied judicial shelter,⁴⁴⁵ and *Ex parte Sackett* furnishes the best of reasons. *Sackett* involved a private suit for damages under the Sherman Act in which it was discovered that the defendant had destroyed certain papers which had been copied by the FBI. The FBI declined to bring forth the papers on the ground that "it was against public policy to produce such documents because they were part of the confidential and official files."⁴⁴⁶ The mere transfer of ordinary papers to the FBI, in other words, sanctifies them and puts them beyond the reach of profane hands.⁴⁴⁷ Disclosure has been ordered of an investigation report by the Alien Property branch of the Department of Justice,⁴⁴⁸ of a naval investigation of a collision,⁴⁴⁹ of an Air Force Inspector General's report of a collision,⁴⁵⁰ and of confidential appraisal reports.⁴⁵¹ At the

⁴⁴⁴ 334 F.2d 570, 580 n.21 (D.C. Cir. 1964).

⁴⁴⁵ *Zimmerman v. Poindexter*, 74 F. Supp. 933 (D. Hawaii 1947). Here the Army was ready to turn over the files bearing on the plaintiff's imprisonment but the Department of Justice objected to inclusion of FBI reports. See also *United States v. Cotton Valley Operators Comm.*, 9 F.R.D. 719 (W.D. La. 1949), *aff'd by equally divided Court*, 339 U.S. 940 (1950).

⁴⁴⁶ 74 F.2d 922 (9th Cir. 1935). The refusal to turn over was sustained by virtue of a regulation promulgated under the "housekeeping" statute, REV. STAT. § 161 (1875), as amended, 5 U.S.C. § 22 (1958), a result that Congress has since made impossible. See text accompanying note 489 *infra*.

⁴⁴⁷ Cf. text accompanying note 497 *infra*. With good reason does Professor Hardin say that "it is appalling for persons in public service to permit bureaucratic routine and a petty proprietary attitude toward 'confidential' files to outweigh elementary considerations of justice." Hardin 901.

⁴⁴⁸ *Royal Exchange Assur. v. McGrath*, 13 F.R.D. 150 (S.D.N.Y. 1952).

⁴⁴⁹ *Bank Line, Ltd. v. United States*, 76 F. Supp. 801 (S.D.N.Y. 1948).

⁴⁵⁰ *Eastern Air Lines, Inc. v. United States*, 110 F. Supp. 491 (D. Del. 1952).

⁴⁵¹ *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1954).

In short: "Investigatory or factual reports not containing state or military secrets . . . have not ordinarily, without more, supported claims of privilege." *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 660-61 (D.C. Cir. 1960).

A case which looks the other way is *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963), a suit by a member of an Air Force bomber crew against a propeller manufacturer for injuries suffered in a crash. Plaintiff sought to obtain the Air Force investigation report which was countered by the offer of the list of witnesses

highest judicial level, the *Jencks* case held that written reports of FBI operatives made prior to trial must be produced if they testify.⁴⁶² All this flowed from the fact that Congress consented to suit and provided for discovery procedures or brought a criminal action.

Since no provision comparable to the federal discovery rules in the courts obtains in the administrative domain,⁴⁶³ the agencies have led a sheltered life. Inroads on this seclusion have been made under the *Jencks* doctrine.⁴⁶⁴ And a series of confidential information denials in passport cases, discharges from public employment, exclusion of resident aliens from readmission, and the like,⁴⁶⁵ has been seriously jeopardized by *Greene v. McElroy*.⁴⁶⁶ That case strikingly illustrates the grave hurt that can flow from resort to executive privilege. Greene was vice-president of an engineering firm which had a government contract that was the source of almost all of its

and a summary of the report. The Air Force refusal of the report was based on the alleged need for confidential treatment in order to encourage cooperation by witnesses. The court ordered disclosure of the "factual findings of the Air Force mechanics who examined the wreckage" and said that more was not required. The Air Force urged that "the investigators encourage frank and full cooperation by means of promises that witnesses' testimony . . . will not be revealed to persons outside the Air Force Technical representatives of the aviation industry concurrently assisting in aircraft investigations could not be expected to find their company at fault if their reports could be used in actions against their companies." *Id.* at 339. But "technical representatives" are unlikely to testify against their company in any event because their testimony might also impel the government to cancel massive contracts or drastically revise them or invoke still other sanctions. The excuse for such concealment is therefore hollow. Nevertheless, the court agreed that "when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program . . . the reports should be considered privileged," especially when the government is not a party and has been so "cooperative." *Ibid.* Thus the court accepted a bare assertion that disclosure would "hamper" efficient operation.

Why should such confidential communications stand on higher ground than those made by "informers"? An informer also must be "encouraged" to inform. The argument that disclosure of an informant's identity will dry up sources of information has been sharply criticized, McKay; and the Supreme Court held in a criminal case that the contents of his communication should be made available in the interests of justice. *Roviaro v. United States*, 353 U.S. 53 (1957). Given a civil case where the investigative report, including its confidential elements, is truly material, the interests of justice should equally override preservation of the confidence. See note 514 *infra*. As was stated in *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 662 (D.C. Cir. 1960), "the fundamental policy of free societies [is] that justice is usually promoted by disclosure rather than secrecy." See also note 459 *infra*. Departure from this policy should call for something more substantial than slender grounds on which the government repeatedly opposes disclosure. Compare notes 399 and 400 *supra*. See also Hardin 881, 884, 887.

⁴⁶² *Jencks v. United States*, 353 U.S. 657 (1957).

⁴⁶³ *Berger Discovery*. Cf. *Communist Party v. Subversive Activities Control Bd.*, 254 F.2d 314, 327 (D.C. Cir. 1958).

⁴⁶⁴ *NLRB v. Adhesive Prods. Corp.*, 258 F.2d 403, 408 (2d Cir. 1958); *Communist Party v. Subversive Activities Control Bd.*, 254 F.2d 314, 330 (D.C. Cir. 1958).

⁴⁶⁵ See Carrow 167.

⁴⁶⁶ 360 U.S. 474 (1959).

business. The government revoked his security clearance on the basis of undisclosed confidential information⁴⁶⁷ and the firm was compelled to discharge him or lose the contract. Greene, who had received a salary of \$18,000 a year, was reduced to taking a job at \$4,000, the only one he could find, for the denial of security clearance barred him from employment in numerous plants all over the United States. Millions of people are employed under defense contracts and the impact of such denials strikes deeply into their economic security. Speaking for the Court, Chief Justice Warren stated:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative and regulatory actions were under scrutiny.⁴⁶⁸

This pronouncement turns on constitutional considerations. Let us now consider *Greene* in terms of evidentiary privilege.

Of privilege in general Professor Morgan has said:

So serious an interference with a rational inquiry can be justified only by accompanying social benefits of high worth. . . . If a privilege to suppress the truth is to be recognized at all, its limits should be sharply determined so as to coincide with the limits of benefits it creates.⁴⁶⁹

⁴⁶⁷ Green had been given three security clearances since World War II, *id.* at 476; he testified under oath and produced a number of witnesses who testified as to his good character; no evidence to the contrary was introduced. *Id.* at 478-79.

⁴⁶⁸ *Id.* at 496-97. Black, Douglas, Brennan and Stewart, JJ., concurred with the Chief Justice who recognized that there was no need to reach the constitutional issue. Frankfurter, Harlan and Whitaker, JJ., concurred on the ground there was no showing that either Congress or the President had authorized the procedure. Mr. Justice Clark dissented, saying "one does not have a constitutional right to have access to the Government's military secrets." *Id.* at 511. And he concluded: "While the Court disclaims deciding this constitutional question, no one reading the opinion will doubt that the explicit language of its broad sweep speaks in prophecy." *Id.* at 524. But *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), may mark a regression (Brennan, J., Warren, C.J., Black and Douglas, JJ., dissenting), justly criticized by Bickel 72-74. See also *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963).

⁴⁶⁹ Foreword to ALI MODEL CODE OF EVIDENCE 5 (1942). In *United States v. Bryan*, 339 U.S. 323, 331 (1950), quoting from 8 WIGMORE § 2192, at 64, the Court said: "We start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive rule."

The benefits of keeping investigative reports secret were summarized by Attorney General Jackson in justifying a withholding from Congress: (1) informers would not reveal if their confidence was not preserved; (2) disclosure might injure innocent individuals because the "reports included leads and suspicions, and sometimes the statements of malicious or misinformed people"; (3) disclosure might prejudice law enforcement or at times (4) national defense.⁴⁰⁰ Similar explanations have been offered for withholding of confidential information and the identity of informers from those discharged from federal employ in the loyalty and security cases.⁴⁰¹

The argument that informers will not talk if their confidence is not preserved received a body blow from Professor McKay's incisive analysis.⁴⁰² The objection does not go to the employment of informers but to using their secret charges as an instrument of administrative oppression. No one insists that the government shall reveal either their identity or their confidence *until* their secret charges are made the basis of an unfair procedure to blast the rights of others.⁴⁰³ It is a reversal of values to be more solicitous of the faceless informer than of the victim who is crushed by his secret charges.⁴⁰⁴ When Attorney General Jackson donned judicial robes he expressed abhorrence of secret evidence employed to exclude the alien wife of a citizen. And he went on to say that "the menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institutions inherent in procedures of this pattern."⁴⁰⁵ Such procedures are reminiscent of the days when Venice lived in terror of anonymous accusations dropped into the Lion's Mouth.⁴⁰⁶ Happily the Supreme Court has progressively cut into the privilege claimed for informers and confidential reports: the *Roviaro* case declared that the preservation

⁴⁰⁰ 40 OPS. ATT'Y GEN. 45 (1941). This was in response to a request for FBI reports by the House Naval Affairs Committee. How much weight can be assigned to such pronouncements when we learn from Senator McCarran that: "For years as chairman of the Judiciary Committee, I had the FBI files handed to me" 99 CONG. REC. 2156 (March 20, 1953).

⁴⁰¹ McKay 148-49.

⁴⁰² *Id.* at 146-60.

⁴⁰³ "If the aim is to protect the underground of informers, the FBI report need not be used. If it is used, then fairness requires that the names of the accusers be disclosed." *United States v. Nugent*, 346 U.S. 1, 14 (1953). (Douglas and Black, JJ., dissenting.)

⁴⁰⁴ McKay 150.

⁴⁰⁵ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (dissenting opinion). This change of attitude, which accompanied the shift from partisan advocate to impartial arbiter, underscores the value of such impartial arbitrament.

⁴⁰⁶ Our soil was not thought favorable for a transplantation of that practice. In 1802, Congressman Nicholson referred to "Venice, where the vilest wretch was encouraged as a secret informer, and the lion's mouth was ever gaping for accusation." 11 ANNALS OF CONG. 824 (1802).

of the informer's identity must give way if that is "essential . . . to a fair determination of a cause";⁴⁶⁷ and that pronouncement is strengthened by the constitutional implications of the *Jencks* case⁴⁶⁸ and of *Greene v. McElroy*.⁴⁶⁹

What of the innocent individual who may be injured by disclosure in a proceeding against another of a confidential report based on unsifted charges? In private litigation the court may be asked to screen that which is irrelevant to the case, and to permit only what is relevant to be disclosed.⁴⁷⁰ If that is unfeasible, the need to safeguard an "innocent" man from aspersions contained in a confidential report must give way to the right of another innocent to protect himself against secret charges that may deprive him of his livelihood⁴⁷¹ or stigmatize him for life.⁴⁷²

When it is a Senator McCarthy who would broadcast unjust aspersions to the world, protection of an innocent man is not so easy. Yet Congress can and should deal with its irresponsible headline hunters. To resort to unlimited withholding of all confidential reports in order to avoid occasional irresponsibility is to embrace a cure that is worse than the disease. In any event, protection of a citizen against congressional excesses was not left to the executive branch, but to the courts.⁴⁷³ The argument that disclosure to Congress may prejudice law enforcement may partially be met by submission of investigative reports for confidential treatment by Congress. For years FBI reports were delivered to Senator McCarran and so treated.⁴⁷⁴ If Congress concludes that the public interest will be better served by publicity than by enforcement proceedings, that choice cannot be barred to the branch that wrote the law which the executive branch would enforce. There remains the alleged prejudice to the "national defense." The old black magic of those words has been drained of its potency now that it is clear that not even "military secrets" enjoy absolute privilege in a private litigation.⁴⁷⁵

(b) Statutory Assurances of Confidential Treatment. To encourage disclosure of private data for administrative purposes,⁴⁷⁶

⁴⁶⁷ See text accompanying note 438 *supra*.

⁴⁶⁸ *Jencks v. United States*, 353 U.S. 657 (1957).

⁴⁶⁹ 360 U.S. 474 (1959).

⁴⁷⁰ *Cf.* note 337 *supra*.

⁴⁷¹ *Greene v. McElroy*, 360 U.S. 474 (1959).

⁴⁷² *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950).

⁴⁷³ See text accompanying notes 272-74 *supra* and text accompanying notes 582-84 *infra*.

⁴⁷⁴ See note 460 *supra*.

⁴⁷⁵ See text accompanying note 412 *supra*.

⁴⁷⁶ 8 WIGMORE § 2377, at 761 (3d ed. 1940).

certain statutes provide for confidential treatment as, for example, for income tax returns, trade secrets, and patent applications.⁴⁷⁷ These are often not air-tight assurances; the income tax statute provides for inspection upon the order of the President under regulations of the Secretary of the Treasury; the Patent Act makes patent applications available in "such special circumstances as may be determined by the Commissioner" of Patents. There might be no occasion to examine such statutes in the frame of disclosure to Congress, for it can expressly provide for inspection by its committees, as it has in the case of income tax returns,⁴⁷⁸ but for an incident involving a comparable statute upon which President Theodore Roosevelt relied in withholding information from Congress—the Act of 1903, which created a Commissioner of Corporations who was "required to report to the President, who is responsible for making public so much of the information collected for him as he (the President) sees fit."⁴⁷⁹ It strains the legislative intention to attribute to Congress a design to permit withholding from itself because it authorized withholding from the "public."⁴⁸⁰

A number of courts have held that statutes restricting the use of confidential information do not deprive the courts of access for purposes of administering justice.⁴⁸¹ And as one said on the issue of "secrecy," "we are confident that it will as wholeheartedly be respected and as sedulously preserved by the juvenile court as it will be by the officers of the welfare department."⁴⁸² Here, as in the case of "informers" who likewise rely on nondisclosure of their identity, there is need for "balancing the public interest in protecting the flow

⁴⁷⁷ INT. REV. CODE OF 1954 § 6103, as amended, 78 Stat. 844 (1964); 38 Stat. 717 (1914), 15 U.S.C. § 46(f) (1958) (trade secrets); 35 U.S.C. § 122 (1958) (patent applications).

⁴⁷⁸ INT. REV. CODE OF 1954 § 6103(d).

⁴⁷⁹ Att'y Gen. Memo. 49. See also *id.* at 17-18; 32 Stat. 828 (1903).

⁴⁸⁰ Earlier I thought that Senator Clark's remark to Roosevelt, "if the papers were of such a nature that they should not be made public the committee was ready to endorse [his] views," Att'y Gen. Memo. 17, could be regarded as a Senatorial construction of the statute as authorizing a withholding from the Congress. But upon further study I concluded that this was one of many expressions of comity rather than a statutory interpretation.

The office of Defense Mobilization makes available to congressional committees "confidential information which it obtains for purposes of approving rapid amortization of emergency facilities." Kramer & Marcuse 657.

⁴⁸¹ *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 662 (D.C. Cir. 1960) ("The secrecy imposed by statute on these documents does not provide immunity from subpoena duces tecum"); *Bell v. Bankers Life & Cas. Co.*, 327 Ill. App. 321, 64 N.E.2d 204 (1945). Cf. *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 227 (1927); *Maryland Cas. Co. v. Clintwood Bank, Inc.*, 155 Va. 181, 193, 154 S.E. 492, 496 (1930); *State v. Church*, 35 Wash. 2d 170, 175, 211 P.2d 701 703-04 (1949) (even though use in a criminal prosecution would make the information public); *State ex rel. Haugland v. Smythe*, 25 Wash. 2d 161, 168-69, 169 P.2d 706, 710 (1946).

⁴⁸² *Id.* at 169, 169 P.2d at 710-11. See text accompanying notes 417-18 *supra*.

of information against the individual's right to prepare his defense."⁴⁸³ Statutory assurances which cannot bar the courts lest they impede the administration of justice, and which were designed by the legislature merely to safeguard against prying by members of the public, need not be construed to deny access to the legislature. And there is no more necessity to read into statutes which expressly bar production in the courts⁴⁸⁴ a congressional intention to bar its own access.

In leaving the recognized categories of evidentiary privilege, it bears emphasis that

The testimonial privileges . . . of the common law have seen a continuing shrinkage. . . . Instead of erecting barriers to what may be relevant material, the trend of the law is to regard the ascertainment of truth its highest duty and often overriding concern.⁴⁸⁵

Great as is the interest of the state in doing justice to the individual, there is an even greater interest in the maintenance of an executive branch that is free from corruption and waste, that complies with requirements of law, and that functions efficiently to meet the ever-changing complexities of our times, for on this depends the welfare and security of the nation.⁴⁸⁶ And no surer instrument for securing those objectives has yet been devised than legislative investigation.⁴⁸⁷

4. The "Housekeeping" Privilege

Insofar as the "housekeeping" privilege rested on the so-called "housekeeping" statute which authorized department heads to make regulations for the custody and use of departmental papers and records,⁴⁸⁸ it has been decently interred by a 1958 amendment which states that said statute "does not authorize withholding information from the public."⁴⁸⁹

It stands no better in terms of "evidentiary privilege," for Judge Maris had earlier declared for the Third Circuit that the Air Force was not "entitled to the absolute 'housekeeping' privilege

⁴⁸³ See note 438 *supra*.

⁴⁸⁴ For illustrations, see 8 WIGMORE § 2377, at 783.

⁴⁸⁵ *Henrik v. Teegarden*, 23 F.R.D. 173, 177 (S.D.N.Y. 1959). Professor McCormick had earlier stated that "the commentators who take a wide view, whether from the bench, the bar, or the schools, seem generally to advocate a narrowing of the field of privilege." McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 469 (1938).

⁴⁸⁶ TAYLOR 98. "Civil liberties . . . imply the existence of an organized society maintaining public order without which liberty itself would be lost . . ." Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

⁴⁸⁷ See note 32 *supra*.

⁴⁸⁸ 17 Stat. 283 (1875), as amended, 5 U.S.C. § 22 (1958).

⁴⁸⁹ 72 Stat. 547 (1958), 5 U.S.C. § 22 (1958). For more extended discussion see Schwartz 18-19.

which it asserts."⁴⁰⁰ The mere fact that a document or record is in official custody is therefore not without more sufficient to shield it from production.

C. *Privilege to Withhold Interdepartmental Communications from Congress*

While the courts were shrinking the scope of executive privilege in private litigation, the executive branch began staking out its boldest claims to withhold information from Congress, chiefly to defend against Senator McCarthy's brutal assaults.⁴⁰¹ The provocation was great, but it is not unfair to say that executive "self-defense" before long caught up with the McCarthean excesses. The resulting claim of privilege to withhold from Congress "conversations and communications" between employees of the executive branch is therefore of quite recent origin—the 1954 Eisenhower directive⁴⁰² which eventuated when President Eisenhower finally turned on Senator McCarthy.⁴⁰³ The directive was rested on the

⁴⁰⁰ *Reynolds v. United States*, 192 F.2d 987, 994 (3d Cir. 1951). In reversing, the Supreme Court confined itself to the "military secret" aspect of the opinion. See text accompanying notes 412-16 *supra*. On the "housekeeping" branch of the case, Judge Maris continues to be cited. *United States v. Certain Parcels of Land*, 15 F.R.D. 224, 230 (S.D. Cal. 1954). See also 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* 591 (1958). The claim of "housekeeping" privilege had earlier been rejected in *Bank Line v. United States*, 76 F. Supp. 801 (S.D.N.Y. 1948).

⁴⁰¹ Professor Wade remarks of the English practice that owing "to the official tendency to push more and more matters into the protected secret area, Crown privilege grew a few years ago into an abuse" WADE, *TOWARDS ADMINISTRATIVE JUSTICE* 22 (1963).

⁴⁰² Reprinted in Rogers 1009. "So astute a commentator as Wigmore . . . completely overlooks it," Bishop 487 n.45, but I would add, because prior to his demise in 1942 this "candid interchange" claim apparently had never been advanced against Congress. At least the indefatigable compiler of "authorities" for Attorney General Rogers did not dredge up even one example that antedates the 1954 directive. I would put to one side the communications between the President and a Cabinet member. See note 381 *supra*.

But Wigmore did notice that several precedents had declared an "evidentiary" privilege "for communications between officials," 8 WIGMORE § 2378, at 781-82 (3d ed. 1940), citing among others *Smith v. East India Co.*, 1 Phill. 50, 11 L.J. Ch. 71, 72 (1842). The East India Company had "governmental" duties and the communications of its directors with royal commissioners were held privileged in order not "to restrain the freedom of the communications and to render them more cautious, guarded and reserved." This was high-level communication. See also *United States v. Six Lots of Ground*, 1 Woods 234, 236 (1872) (correspondence between the attorney general and a district attorney as to dismissing a writ of error, held confidential). But note that Wigmore sums up that the scope of the privilege beyond secrets "in the military or international sense is by no means clearly defined; and, furthermore, that it has not become a matter of precedent or even of debate in more than a few jurisdictions," and that "ordinarily there are [not] any matters of fact, in the possession of officials, concerning solely the internal affairs of public businesses, civil or military, which ought to be privileged from disclosure . . ." 8 WIGMORE 788-89.

⁴⁰³ The worm was long in turning. For details of McCarthy's mounting effrontery see BARTHE 24-26, 40-65, 83, 154-55 and TAYLOR 87, 112-35, 266-69.

alleged need that "employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters" in the interest of "efficient administration."⁴⁰⁴ The difficulty with his view was unwittingly disclosed by Acting Director Saccio of the International Cooperation Administration: "*if ICA wanted to apply the 'executive privilege' GAO would not see one thing because practically every document in our agency has an opinion or a piece of advice.*"⁴⁰⁵ It was not long in dawning on harried administrators that here was a beautiful, new invitation to withholding. What had once been the exception soon hardened, in the words of a friend of the privilege, Senator Morse, into a "uniform practice," a "blanket policy."⁴⁰⁶ So, the Department of the Interior advised a House Committee that while the sought for documents "did not contain any information which the Department would be unwilling to make available to Congress, it, nevertheless, considered itself bound to 'honor the principle which has been followed from the beginning of our Government,' "⁴⁰⁷ *i.e.*, to withhold. Thus a claim born of desperation in 1954 had ripened by 1956 into a time-honored "principle," which like the Juggernaut rode over a request for information that confessedly there was no reason to withhold.

The "principle," it needs to be said, survived in the Kennedy administration; the one instance in which President Kennedy concurred in a claim of privilege rested on this need for "candid" interchange.⁴⁰⁸ But the President emphasized that the principle "cannot be automatically applied to every request for information. Each case must be judged on its merits."⁴⁰⁹ This in itself constitutes a great change from prior practices as will now appear.

⁴⁰⁴ See Rogers 1009. "Such communications might deal with personnel matters, budgetary information, advice given by a subordinate official to a superior, consultations among associates or exchanges of information among different departments." Carrow 185.

In *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958), Mr. Justice Reed, sitting by designation, said that "confidential intra-agency advisory opinions . . . are privileged . . . but not absolutely." The document sought "was part of the reasoning process" whereby "an administrator [was] reaching a decision" and the court concluded that it would not "probe the mental process" involved. *Id.* at 946. Moreover, said the court, the record did not show the "need for examination of the privileged document." *Id.* at 947.

⁴⁰⁵ Quoted Kramer & Marcuse 852. (Emphasis supplied by author.)

⁴⁰⁶ *Id.* at 851-52. A number of withholdings from Congress of interdepartmental communications will be found in *id.* at 647-48, 654-56, 658, 660, 664, 667, 842.

⁴⁰⁷ *Id.* at 660.

⁴⁰⁸ A Senate subcommittee, reviewing military cold war education and speech review policies, sought to obtain testimony from a Defense Department official about the specific speech revisions he had made. Secretary of Defense McNamara declined to furnish the information, assuming responsibility for the speech review and President Kennedy concurred. Gov't Info. Memo. 43-44.

⁴⁰⁹ *Id.* at 44.

Earlier, the Department of Agriculture sought to withhold "initialed file copies of an amendment" because "they related solely to its internal operations . . .,"⁵⁰⁰ thus fulfilling Director Saccio's view that everything could be withheld under executive privilege because "practically every document in our agency has an opinion or a piece of advice,"⁵⁰¹ or merely *an initial* on it. Then there was the State Department's withholding of comments made by its employees to a "management consulting firm which was preparing a management survey report" because the employees had been assured that "the privacy of their comments would be respected."⁵⁰² What can more plainly be grist for the "efficiency" investigating function than employee comments on the operation of internal management? This can be "confided" to an outside firm but must be concealed from Congress! So too, the Department of Agriculture refused to submit a Farm Population Estimate pamphlet which had been withdrawn from distribution and destroyed.⁵⁰³ Even privilege protagonists labelled this a "trivial matter" and an "awkward recourse to the Executive privilege."⁵⁰⁴

Consider next the extension of the "candid interchange" umbrella to *final reports*. President Eisenhower himself interpreted his directive to apply only to "conversations that take place between any responsible official and his advisers" or to "mere little slips . . . expressing personal opinions on the most confidential basis." An "official act," he said, submitted "either in the form of recommendations or anything else, *that is properly a matter for investigation if Congress so chooses, provided the national security is not involved.*"⁵⁰⁵ Despite the Eisenhower interpretation, the bureaucracy has repeatedly invoked the directive for the withholding of final reports. One such incident, involving an Air Force Inspector General's Report has been discussed earlier.⁵⁰⁶ Additionally there have

⁵⁰⁰ Kramer & Marcuse 658-59.

⁵⁰¹ Quoted in *id.* at 852.

⁵⁰² *Id.* at 667.

⁵⁰³ *Id.* at 877.

⁵⁰⁴ *Id.* at 911. Compare this history with the prophecy made by a friend of executive privilege: "If President Eisenhower's directive were applied generally in line with its literal and sweeping language, Congressional committees would frequently be shut off from access to documents to which they are clearly entitled by tradition, common sense, and good governmental practice. It is unlikely, therefore, that this ruling will endure beyond the particular controversy that precipitated it." TAYLOR 133. It did, however, endure and expand throughout the Eisenhower era.

⁵⁰⁵ Quoted Kramer & Marcuse 685 n.246. (Emphasis added.) Note the broad approach of the President when he speaks directly as differentiated from documents prepared for his signature by his subordinates, a fact again illustrated by the Dixon-Yates incident that follows. Compare Secretary Weeks' criticism of bureaucratic oppressiveness in his own Department of Commerce. Newman & Keaton 581.

⁵⁰⁶ See notes 354-68 *supra*. For other denials of Inspector General's reports by the Department of Defense, see Kramer & Marcuse 654-55.

been withheld a task force report to the Presidential Advisory Committee on Energy Supplies and Resources,⁵⁰⁷ Evaluation Reports on the aid program to Laos,⁵⁰⁸ to Vietnam,⁵⁰⁹ to Pakistan, India, Guatemala, Bolivia, and Brazil,⁵¹⁰ and a "final list" to be submitted by the United Nations to a NATO subcommittee respecting suggested strategic commodities to be embargoed under the Battle Act.⁵¹¹ Doubtless there are other instances.

The legitimate interest of Congress in this segment of foreign relations has been recognized by proponents of executive privilege:

The foreign aid legislation has a double aspect: It is an instrument of foreign policy; at the same time, it involves a heavy outlay of Government funds. Hence it constitutes an area in which the President's foreign relations power and Congress' authority over appropriations meet.⁵¹²

Bearing in mind the role that "military aid" today plays in foreign relations, and the vast expansion of the entire military budget, certain items of which may be no less entitled to secrecy than foreign relations, it may be said with Judge Learned Hand that

Congress, especially now that appropriations for the armed forces are the largest items of the budget, should be allowed to inquire in as much detail as it wishes, not only how past appropriations have in fact been spent, but in general about the conduct of the national defense.⁵¹³

By the same token, inquiry is essential into the conduct of and disbursements for the gigantic foreign aid program. Promotion of intra-departmental candor is too dearly bought at the price of barring congressional access to such information. There is indeed reason to believe that such a bar is not an ineluctable administrative necessity, that disclosure is not in fact incompatible with administrative needs. Soon after Dean Rusk became Secretary of State he was "ap-

⁵⁰⁷ *Id.* at 658.

⁵⁰⁸ *Id.* at 849.

⁵⁰⁹ *Id.* at 851.

⁵¹⁰ *Id.* at 848.

⁵¹¹ *Id.* at 842-43. Some "200 items were [earlier] removed from the list of 450 commodities which had been embargoed under the Battle Act." The Senate Committee understandably "felt concerned" and "'sought to find out why and how this relaxation in the embargo took place.'" *Id.* at 841.

⁵¹² *Id.* at 827. One of the severest critics of investigative excesses has said that "control over appropriations would lose much of its meaning if it were not accompanied by an authority to scrutinize the uses to which appropriations had been put; the lawmaking prerogative would be a nearly empty one if it did not also imply a right to call the Executive to account for the administration of the laws." BARTH 15-16. Because of the vast range of administration, it is this investigative "device more than any other which prevents misconduct in the executive branch and keeps executive authority within the limits set for it." *Id.* at 16.

⁵¹³ HAND 17-18.

parently prevailed upon" by career officials in the department "to renew the assertion" to a congressional subcommittee that certain requested ICA foreign aid evaluation reports were "privileged"; but the Department's refusal to disclose was withdrawn 48 hours later, apparently because of the "interest in the case expressed by the White House."⁵¹⁴

Recurring rumors of mismanagement, which more than once have proven too true,⁵¹⁵ underscore the need for full inquiry "intra-departmental candor" notwithstanding. There was the incident of the rejection of a low bid on a projected grain elevator in Pakistan and negotiation of a contract with a company which had submitted a bid nearly \$1,000,000 higher under dubious circumstances. At the end of the hearings, which resembled nothing so much as an administrative obstacle course, the Director of Foreign Operations Administration told the committee that all proposals had been cancelled, that a new contract would be awarded upon open bidding, and that certain parties would be ineligible to bid to avoid conflicts of interest.⁵¹⁶ In this situation to plead that the "operating men" should "be free of any feeling that they will be called upon to explain any recommendations that they may make"⁵¹⁷ only serves to insulate skulduggery.

There seems to be no valid reason why Congress should not be told why subordinates permitted the department head to negotiate a contract which involved conflicts of interest and questionable circumstances. The fact that the latter takes final responsibility is no assurance that he was aware of the underlying facts. And it is ventilation of those facts which permits Congress to ferret out inefficiency or waste. Former Assistant Attorney General Kramer said that:

The FOA Grain Storage Elevator in Pakistan incident shows how embarrassing and damaging it may become to the concept of the Execu-

⁵¹⁴ Gov't Info. Memo. 44-45.

Despite certain concessions made by the government, "freedom and candour of communication" still rides high in England. Professor Wade justly asks "if this argument is now abandoned in the case (for example) of prison officers' reports where the charge is one of negligence, why is it justified in other cases? . . . And why, again, should the argument . . . be waived in criminal cases but not in civil cases? . . . In private life candid reports have to be made by many professional men . . . yet they do not shrink from giving honest opinions because there is a distant chance that their report may one day have to be disclosed in court. Lord Radcliffe said in the House of Lords: 'I should myself have supposed Crown servants to be made of sterner stuff [Glasgow Corp. v. Central Land Board, 1956 S.C. 1, 20].'" WADE 246.

⁵¹⁵ For example, a series of articles was published "denouncing waste and inefficiency in the aid program in Vietnam." Kramer & Marcuse 851.

⁵¹⁶ *Id.* at 828-29, 838.

⁵¹⁷ *Id.* at 832. See also *id.* at 837.

tive privilege, if a congressional investigation, originally strongly resisted by an agency, proves to have been justified.⁶¹⁸

The incident illustrates that if the executive may censor what Congress may see it could well abort an investigation that might prove itself justified.

That the claim of privilege for interdepartmental communications tends to conceal facts which cry out for airing is again illustrated by the Dixon-Yates case. This arose out of the contract between the Atomic Energy Commission and the Mississippi Valley Generating Company for the construction of a power plant and the sale of electric power to the United States.⁶¹⁹ It was entered into at the request of President Eisenhower,⁶²⁰ who avowedly desired to revise the government's approach to the public power program and to encourage private power development.⁶²¹ Adolphe H. Wenzell, an officer of First Boston, which was interested in financing the project, "had prepared certain financial studies in connection with the contract while he was employed in the Bureau of the Budget."⁶²² The Supreme Court later said that he was "the real architect of the final contract," that in numerous instances he "seemed to be more preoccupied with advancing the position of First Boston or the sponsors than with representing the best interests of the Government."⁶²³ The Kefauver Senate Committee undertook an investigation of this transaction and President Eisenhower declared that it was "open to the public."⁶²⁴ Although the President had "waived"

⁶¹⁸ *Id.* at 911. In an investigation of the Laos program, it developed that several officials had conflicts of interest, that a government employee had accepted bribes, that others had "questionable dealings," and the subcommittee concluded that "ICA failed to investigate diligently charges of impropriety and failed to take significant remedial action even after reliable evidence was obtained." *Id.* at 850.

Inevitably the suspicion arises, as Senator Fulbright remarked on another occasion, that the invocation of executive privilege may constitute "a cover up for a mistake rather than a means of protecting crucial intelligence." *Id.* at 910-11. On another occasion a similar inference was drawn by Representative Fountain, *id.* at 878, and after considerable pressure the Department of Agriculture turned over information rather than suggest the possibility that it was "damaging to the Department." *Id.* at 880. "When the charge was made that certain withheld documents were damaging to him, [President] Jackson immediately ordered them revealed." Younger 775. Proponents of privilege have remarked that while "the interests to be protected by the withholding of information may be important; still they may be outbalanced by the suspicions and adverse inferences which follow the claim of privilege." Kramer & Marcuse 910. For some withholdings which were not "important," see text accompanying notes 497, 503-04 *supra*.

⁶¹⁹ Kramer & Marcuse 689-90.

⁶²⁰ *Id.* at 713.

⁶²¹ *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961).

⁶²² *Id.* at 523-24; Kramer & Marcuse 690.

⁶²³ 364 U.S. at 552, 558.

⁶²⁴ Kramer & Marcuse 690-91.

his directive in this case so that "every pertinent paper or document could be made available to the Committee," Mr. R. H. Hughes, Director of the Bureau of the Budget, declined to furnish a "report made by Mr. Wenzell as adviser to the Bureau of the Budget" on the ground that it was a "confidential document."⁶²⁵ Only when the President, upon being prodded at a press conference, declared that if Wenzell had "brought in a definite recommendation" he would be "very delighted to make that public" did the Budget Director make it available.⁶²⁶ Thus the President once more confirmed that "final reports" were not meant to be withheld; and he recognized that the public interest in disclosure rises above the need for protecting "candid interchange."

The Dixon-Yates incident, which has ramifications that cannot here be followed,⁶²⁷ shows how the "directive" has served to cover up questionable "confidential" advice, and that administrators are likely to be swayed by petty considerations, or even to sweep "mistakes" under the rug. And the President first learned about the "mistakes" when they were exhumed by Congress. Can it be argued that protection for such "candid interchange" is of greater public benefit than congressional investigation, which alone was responsible for exposing the incident over persistent executive heel-dragging?⁶²⁸ And what of the tawdry communications of Sherman Adams (the President's alter ego) with the Federal Trade Commission and the Securities and Exchange Commission on behalf of Bernard Goldfine⁶²⁹ (subsequently imprisoned for violations of federal law), which were "interdepartmental communications" and only emerged because a House Committee unearthed the fact that Mr. Adams "had stayed at certain hotels at Mr. Goldfine's expense"?⁶³⁰

Apart from unearthing corruption and inefficiency, Congress also needs information in order to legislate and appropriate intelli-

⁶²⁵ *Id.* at 691.

⁶²⁶ *Id.* at 692.

⁶²⁷ See, e.g., the intervention of Presidential Assistant, Sherman Adams, at the SEC. *id.* at 696-702, and the balkiness of Chairman Lewis Strauss of the AEC, *id.* at 707-11, which in considerable part later led to Senate rejection of his nomination as Secretary of Commerce, *id.* at 712, 717, and which Messrs. Kramer and Marcuse dismiss with Senator Schoeppel's "revealing" remark that "all of this is a stylized performance in the never ending tug-of-war between the legislative and executive branches." *Id.* at 717. This is a singular comment on measures to thwart an inquiry which produced evidence that later led the Supreme Court roundly to condemn the conflicts of interest that were uncovered. See text accompanying note 523 *supra*.

⁶²⁸ Kramer & Marcuse 689-711.

⁶²⁹ *Id.* at 702.

⁶³⁰ *Id.* at 702 n.351. A student of these and still other incidents concludes that "the evidence is indisputable that he [Sherman Adams] intervened rather positively in the affairs of the commissions on at least several occasions." KOENIG 391.

gently. In 1958, Chairman Lyndon Johnson of the Senate Preparedness Subcommittee requested copies of the "Killian and Gaither panel reports" which had been prepared at President Eisenhower's request to assess the nation's military status. The President refused on the ground that a turnover would (1) "violate the confidence of the advisory relationship" and (2) "make public the highly secret facts contained in their reports."⁵³¹ How can that "confidence" be weighed in the scales with the fears that haunted Congress and the nation as the Soviet Sputnik circled the skies?⁵³² Johnson and Speaker Rayburn could as readily be trusted with information that must at all costs remain secret as Eisenhower himself. When President Kennedy was taking steps to "quarantine" Cuba in the ominous days of November, 1962, measures that carried the dread possibility of atomic war, he did not keep the congressional leadership in the dark.⁵³³ Surely lesser matters are not entitled to greater concealment. Nor does communication to Congress necessarily entail publicity.⁵³⁴ True, the President is Commander-in-Chief, but it is Congress that is to "raise and support armies." Without the aid of Congress he would have no army to command, and before it raises an Army it is entitled to know "the state of the Nation." It should not be forced "to legislate in a vacuum."⁵³⁵ Upon Congress no less than the President depends the readiness of the nation to meet the dangers that threaten: "The Congress, as well as the President," said Mr. Justice Douglas, is "trustee of the national welfare."⁵³⁶ It is not a limited partner in the business of governing. Nor must the desirability of secrecy be too readily assumed. There is impressive testimony by noted scientists that the top-secret executive approach has hindered the technological development which is the key to paramouncy in the Cold War.⁵³⁷ And at least one competent

⁵³¹ Carrow 167.

⁵³² The Sputnik was fired on October 5, 1957. N.Y. Times, p. 1, col. 8. "Not unnaturally, many Congressmen have come to feel that they are being torn and badgered by dilemmas for which they are not responsible . . ." TAYLOR 110.

⁵³³ Time, Nov. 2, 1962, p. 26.

⁵³⁴ See notes 567-69 *infra*.

⁵³⁵ This was a Senate committee's plaint. Kramer & Marcuse 877.

⁵³⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) (concurring opinion).

Not a little remarkable is the withholding from Congress of unpublished opinions of the Attorney General, accompanied by an admonition that "the relationship between the United States and the Department of Justice was that of attorney and client." Kramer & Marcuse 664. This Freudian slip, the assumption that the executive department is the United States and that the Congress is not, may furnish a clue to the malady.

⁵³⁷ Wiggins 68-69. Lord Radcliffe, a judge of the Court of Appeals, who led a security inquiry after the conviction of William J.C. Vassal for espionage, reportedly said that "'everybody' who had anything to do with security 'always began and ended by realizing that far too much was called secret, compared to what was truly important.'" N.Y. Times (Western ed.), Aug. 7, 1963, p. 2.

observer remarks that "there is considerable likelihood, however, that the *Congress may be less well informed than the enemy*."⁶³⁸ Certainly the record of unflagging departmental opposition to disclosure on any and all grounds does not conduce to confidence in executive determinations that information must be withheld.⁶³⁹

Such confidence is further undermined when one overcomes the tendency to personify executive refusals, to view them as actions by the department head or the President, and considers that agency heads "cannot, and should not . . . determine in every instance whether or not action is required."⁶⁴⁰ What this means in a private litigation disclosure context was graphically portrayed by Wigmore:

The subordinate at that lowest point, obsessed by the general dogma against disclosure, prepares a reply denying the application; he will usually not have the initiative or courage to propose an exceptional use of discretion in favor of granting the application. This draft reply is sent up, "through channels" (as the phrase goes) past two or more intervening superiors (each one treating it in routine fashion), till it reaches the Departmental head or other chief officer whose signature is necessary. Arriving in a ponderous pile of daily draft correspondence [plus quasi-judicial opinions, legal or economic memoranda, drafts of proposed legislation or rules, or of proposed testimony before congressional committees], it receives the necessary signature without further consideration.⁶⁴¹

One who has seen government service, whether in upper or lower echelons, can confirm that the picture is lifelike. And it is generally

⁶³⁸ Wiggins 66, quoting SMITHIES, *THE BUDGETARY PROCESS IN THE UNITED STATES* 276. (Emphasis in original.)

⁶³⁹ We may perceive in another context how far administrative obstinacy, even persistence in wrong-headedness, can go. In the sequel to *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (sustaining bar to admission of foreign wife of American serviceman), the House "after considering the objections of the Department of Justice," had unanimously passed a private bill for Mrs. Knauff's relief. While like action was pending in the Senate, the Immigration officials hastily brought her to Idlewild Airport for passage to Germany, and were halted only twenty minutes before departure by a stay issued by Mr. Justice Jackson. He stated that this departmental action was calculated to "defeat any effort" to obtain Supreme Court review of her petition for habeas corpus, and to "circumvent any action by Congress—which the Department has vigorously opposed—to cancel her exclusion." GELLHORN & BYSE 812-13.

Another illustration of administrative persistence in error, after condemnation by a Senate committee, is afforded by *Heyer Prods. Co. v. United States*, 140 F. Supp. 409, 411, 412 (Ct. Cl. 1956). Heyer had testified before a Senate committee that an Ordinance Center had made an award to the high bidder though Heyer's bid was \$116,730 lower. The Senate report said that Ordinance failed to "give convincing explanations" of the rejection of the low bid. Thereafter Heyer bid again, was again the low bidder and again the same high bidder was preferred. After investigation the Senate committee reported that this "is a shameful story." Judicial review unhappily was unavailable because of the "standing to sue" doctrine. Research would doubtless multiply the instances.

⁶⁴⁰ *Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 8, 77th Cong., 1st Sess. 18-22 (1941), quoted in GELLHORN & BYSE 19.

⁶⁴¹ 8 WIGMORE 793 (3d ed. 1940). Cf. note 416 *supra*.

agreed that the flood of major matters that cry for action by the department head must constrain him to shunt such relatively unimportant matters aside.⁵⁴² If they do reach him and involve "technical or complex" matters, perhaps military secrets, the agency head, a veteran administrator has remarked in another connection, will usually take the staff proposals "on compulsory faith";⁵⁴³ "staff recommendations will inevitably be taken as *prima facie* correct."⁵⁴⁴

Of course the stakes are higher when Congress rather than a private litigant seeks information. But such requests also do not ordinarily reach the department head but are siphoned off by some lower official. If he is a top level associate, a general counsel for example, competing claims on his attention should not be lightly discounted. Initial refusals may therefore rest on the dictum of some bureaucratic underling to whom secrecy of the files has become second nature.⁵⁴⁵ As the heat rises review is escalated but by that time the agency position very likely has jelled, for it is the exceptional administrator who will freely admit that his subordinates have erred.⁵⁴⁶ Some of the "embarrassing" withholdings earlier noted probably had their origin in just such a train of circumstances.

⁵⁴² *Ibid.* MCCORMICK, EVIDENCE 307 (1954). See note 416 *supra*.

⁵⁴³ Gardner, quoted in GELLHORN & BYSE, at 25.

⁵⁴⁴ *Id.* at 27.

⁵⁴⁵ See text accompanying note 399, 502-03 and note 491 *supra*. A former Deputy General Counsel of the Army tells us that "usually, the head of a department has an aide—often his general counsel—who is responsible for what is bureaucratically known as 'legislative liaison.' The aide controls the flow of information to Congress, referring only the hottest questions to his boss. Of course the ability and views of these virtuosi vary widely, and most of them play by ear . . ." Bishop 489. Not by choice do they "play by ear" but because the nightmarish flow of business across their own desks simply leaves no time for the kind of meaningful study that is involved in making an independent judgment. The subordinates upon whom perforce they must rely are often as not little men whose first instinct is to hold all cards close to their chests. See Hardin 883.

A House subcommittee recently referred to cases "in which the executive branch personnel—often far down the administrative line from the President—cited this 'privilege' as authority for withholding information from the Congress and the public." Gov't Info. Memo. 43.

That such determinations can turn on petty considerations was perceived by Lord Simon in *Duncan v. Camell, Laird, & Co.*, [1942] A.C. 624, 642.

⁵⁴⁶ Senator Paul Douglas, a sympathetic observer of the administrative process, has observed that administrators, as other human beings, "do not like to admit mistakes and they naturally protect their own class." DOUGLAS, ETHICS IN GOVERNMENT 86 (1952), quoted GELLHORN & BYSE 182. In England, states Professor Wade, "the Minister will do what he can, out of natural loyalty, to protect his officials from censure." WADE, TOWARDS ADMINISTRATIVE JUSTICE 99 (1963). For examples of persistence in wrong-headed administrative action, see note 539 *supra*.

Warner Gardner stated that: "In the course of a quarter of a century in Washington I have encountered only one clear instance where the head of an already established agency or department succeeded in subjugating his employees to the point that the clear preponderance of the departmental actions, where there was room for choice, reflected his views rather than those held by his staff when he held office. That was done by Harold Ickes [who had 13 years in which to accomplish it]." Quoted GELLHORN & BYSE 27.

The difference between low level and top level consideration is illustrated by the broader attitude taken by President Eisenhower on the few occasions when he was questioned at news conferences about information withholding,⁵⁴⁷ and by the drastic diminution of the stream of refusals after President Kennedy took hold of the spigot.⁵⁴⁸ It may therefore be thought that the cure is to require certification by a department head that he has considered the matter personally. For the most part this would merely add an empty formality if only because of the relentless pressure of more important affairs.⁵⁴⁹ An arresting illustration is afforded by the Attorney General's Memorandum earlier discussed. When one considers its numerous internal contradictions,⁵⁵⁰ its strange concatenation of "authorities" which on even cursory scrutiny are revealed to be no authority at all,⁵⁵¹ it is scarcely conceivable that either the Attorney General or his chief assistants could have read it.⁵⁵² The fact that it was submitted to Congress in its woefully inadequate state over the Attorney General's signature as decisive of a long-standing controversy between Congress and President should make us skeptical of certifications by department heads on such lesser issues as the need to withhold information in the public interest.

VIII. PRACTICAL ARGUMENTS FOR EXECUTIVE PRIVILEGE EXAMINED

If I have not misread history, the power of legislative inquiry into executive conduct at the time of the adoption of the Constitu-

⁵⁴⁷ See text accompanying notes 505 and 524-26 *supra*.

⁵⁴⁸ See text accompanying note 6 *supra*. Like President Kennedy, President Johnson has announced that he "will not permit subordinates to claim executive privilege to withhold government information from the Congress" but that the claim "will continue to be made only by the president." San Francisco Chronicle, April 3, 1965, p. 8, col. 1.

⁵⁴⁹ See suggested statute in text accompanying notes 573-75 *infra*.

⁵⁵⁰ Compare his quotation of the Act of 1789 requiring the Secretary of the Treasury to furnish information to the Congress as "*may be required*," Att'y Gen. Memo. 47, with his statement that: "Up to now, Congress has not passed such a law," *id.* at 4; his statement that "courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information," *id.* at 1, with his quotation that "the legal problems which are involved were never presented to the courts." *Id.* at 62.

Corwin is cited by him as confirming "the soundness of the actions of our Presidents and the decisions of the courts which lodges in the executive branch the power to determine what information to divulge and what to keep secret," Att'y Gen. Memo. 43, despite a quotation from Corwin on the same page: "Nevertheless, should a congressional investigating committee issue a subpoena duces tecum to a Cabinet officer ordering him to appear with certain adequately specified documents, and should he fail to do so, I see no reason why he might not be proceeded against for contempt of the house which sponsored the inquiry."

⁵⁵¹ E.g., *Appeal of Hartranft*, discussed in text accompanying notes 311-14 *supra*. See also note 309 *supra*.

⁵⁵² See statement by Mr. Justice Jackson, quoted in note 416 *supra*.

tion was virtually unlimited; and on the whole it has served the democratic process well. While history is not a straitjacket, departures from historical "meaning" should not be at the call of every breeze that blows but only in response to grave-exigencies adjudged to be such by the courts.

The strongest argument for the existing *de facto* substitution of an unlimited power of withholding in the executive discretion is made by Professor Bishop, who concludes that "whereas the present situation is quite tolerable ["not inimical to good government"], unlimited congressional access to executive information (whether "secrets of state" or merely "official information") would almost certainly be intolerable."⁵⁵³ This conclusion collapsed under the recent facts: with one exception President Kennedy gave Congress complete access to executive information⁵⁵⁴ and as yet there is no sign that the consequences are "intolerable." Then too, over the years the vast bulk of congressional requests for information have met with compliance,⁵⁵⁵ from which we may conclude that "merely 'official information'" was freely turned over without "intolerable" consequences. The claim of privilege for "merely 'official information,'" it cannot be unduly emphasized, is of relatively recent origin,⁵⁵⁶ and such claims have been rebuffed in private litigation.⁵⁵⁷ Of grave military and state secrets more will be said later. Several "practical considerations" are advanced by Professor Bishop.

First, he argues, "congressional control over appropriations and legislation is an excellent guarantee that the executive will not lightly reject a congressional request for information . . ."⁵⁵⁸ Events have proven the "guarantee" ineffectual; repeatedly the very administration under which he served lightly rejected such requests,⁵⁵⁹ notwithstanding congressional power to appropriate or abolish functions. Happily Congress has not permitted its frustrations to drive it to effective reprisals, such as withholding appropriations for missiles programs or abolishing the office of Inspector General because information was not forthcoming from the Armed

⁵⁵³ Bishop 486.

⁵⁵⁴ See text accompanying note 6 *supra*.

⁵⁵⁵ See text accompanying note 304 *supra*. Kramer & Marcuse 898, 629, 638.

⁵⁵⁶ See Younger 771-73. See also text accompanying note 492 *supra*.

⁵⁵⁷ "Merely 'official information'" no longer can lay claim to the shelter of the housekeeping statute, see text accompanying note 489 *supra*; it enjoys no case-law protection, see text accompanying note 490 *supra*. See also Wigmore's comments, quoted in note 492 *supra*. See also note 451 *supra*.

⁵⁵⁸ Bishop 486.

⁵⁵⁹ See, e.g., text accompanying notes 356-65, 497, 500-04, 507-11, 518-52 *supra*.

Services.⁶⁰⁰ That, in the current argot, would be "a hell of a way to run a railroad."

Second, argues Professor Bishop, "Congress may not be a safe repository for sensitive information," and "in the heat of partisan passion" the national interest may run "a very poor second to considerations of faction."⁶⁰¹ He cites as an example Senator Burton K. Wheeler's revelation of "the Navy's occupation of Iceland [during World War II] while the operation was still in progress and the ships vulnerable to attack by submarines," apparently because Wheeler was an "extreme isolationist."⁶⁰² Such conduct should not be extenuated; but is the alternative to conceal from Congress occupation of a foreign country until after the event? Consider an "occupation" of Guatemala or Cuba.

The British have "successfully practiced" an "alternative to non-information," taking the legislature into executive "confidence very fully" subject to security checks applicable to the executive; and an English writer remarks that during World War II the "high quality" of security was "astonishing" in light of the extent to which "Parliament was privy to the details" and "continuous publication to between six and fourteen hundred persons."⁶⁰³ Our own early history affords a parallel example: the injunction of absolute secrecy for the proceedings of the Constitutional Convention was scrupulously observed.⁶⁰⁴

If it be assumed that some "sensitive" information must be withheld, that need scarcely justifies the wholesale withholding of minor matters reported in the Kramer and Marcuse collection. But, in fact, really sensitive matters are not shielded from congressional leaders, witness President Kennedy's disclosure to the leadership on the eve of the Cuban "quarantine" in November, 1962.⁶⁰⁵ Nor

⁶⁰⁰ See text accompanying notes 356-65 *supra*.

⁶⁰¹ Bishop 486.

⁶⁰² *Id.* at 486 n.41. For additional examples, see Newman & Keaton 570-71 n.38. The authors also call attention to examples of "possible abuses of the executive right of privacy."

⁶⁰³ Parry 741.

⁶⁰⁴ FARRAND, FRAMING 58-59.

⁶⁰⁵ See text accompanying note 533 *supra*. Professor Bishop generously read the manuscript of this article and concluded, I am authorized to say, that "our differences are mainly differences of emphasis. When I say that unlimited discretion in Congress to require the Executive to disclose information would be intolerable, I mean only that Congress should not have the last word. My own view is certainly that there is a strong presumption in favor of disclosing information and that it should be withheld from Congress only in extraordinary circumstances." In a second letter, he agreed that "information is furnished in truly 'extraordinary' circumstances The controversies have, without exception, I believe, arisen in the context of domestic political hassles of one sort or another." Yet the Teapot Dome

is it conceivable in light of the astronomical appropriations that were required to be accounted for, that the leadership in Congress was kept in the dark respecting the Manhattan Atomic Project. That confidence was kept inviolate. It would be a sad day for America if crucial foreign or military affairs were to be concealed from Congress. The Constitution was designed to prevent the President from embarking on military or foreign adventures single handed. To that end, for example, the power to declare war was lodged in the Congress,⁶⁰⁰ and without information Congress cannot act as a check. Grave matters of state inevitably must be and are shared, so that in reality the plea of secrecy serves chiefly to shield the inconsequential.

The executive branch cannot ask the Congress to have faith in it when it exhibits none in Congress, as when the Army refused to divulge information about the unfortunate U-2 flight over Russia in 1960, "even under conditions of complete secrecy."⁶⁰⁷ If there has been an infrequent congressional "leak," the executive branch too has known its dreadful leaks, *e.g.*, Rosenberg.⁶⁰⁸ There is an aura of self-righteousness about the executive determination that it alone can be trusted with "secrets." "Bureaucrats," no less than Congressman, Professor Bishop recognizes, act both "from the best and worst of motives."⁶⁰⁹

disclosures resulted from just such a "political hassle." A Congress of the President's own political persuasion will look indulgently at executive "peccadilloes."

⁶⁰⁰ U.S. CONST. art. I, § 8(11).

⁶⁰⁷ Kramer & Marcuse 892. The flight of an "acknowledged American Spy" over Soviet territory on the eve of a "summit conference" between Khrushchev and Eisenhower, the immediate collapse of the conference, the question whether trigger mechanisms were adequately policed, all agitated the public mind. WHITE, *THE MAKING OF THE PRESIDENT*, 1960, at 138-40 (Cardinal ed. 1961).

⁶⁰⁸ See *Rosenberg v. United States*, 346 U.S. 273 (1953). On Oct. 11, 1963, the New York Times (Western ed.), p. 1, reported that an Army sergeant who had been assigned to the National Security Agency committed suicide when under investigation for security violations, having allegedly "delivered the nation's most sensitive codes and communications secrets to the Russians."

During John Adams' presidency, Secretary Wolcott, a member of his Cabinet, was supplying Alexander Hamilton, Adams' inveterate enemy, "with confidential government communications." 2 PAGE SMITH 1043. On a lower level, compare the leak by an Army Intelligence Officer to Senator McCarthy of an FBI report. Kramer & Marcuse 679.

Taylor asks: "Are the members and staffs of the Congressional loyalty investigating committees more or less trustworthy than the security agencies of the executive branch? It is well known that a number of ex-Communists have been employed by these committees, and that many others are in touch with their staffs as sources and consultants. Is the discretion of the staffs, and the sincerity of conversion of these former Communists beyond doubt?" TAYLOR 108. All this is no less true of ex-Communists who have been in the employ of the FBI. See McKay 152.

⁶⁰⁹ Bishop 477. It is not Senator McCarthy alone who would "prospect in the security files of charwomen, junior clerk-typists and building guards," *id.* at 488, for a "short order cook" at a Naval Gun Factory was "summarily" barred by an

Assume that some secrets are of such gravity that disclosure must be rigorously limited. For this situation we have Pitt's suggestion, early picked up by a congressional committee, that the secret be transmitted to a select few designated by the legislature.⁶⁷⁰ That suggestion was acted upon by Secretary of State Dulles when he showed Senators Taft and Sparkman confidential material respecting a nominee for high office.⁶⁷¹ Both President Hoover, and later the younger Hoover, as acting Secretary of State,⁶⁷² offered to make confidential information available if the Committee would pledge itself not to publicize the information. On both occasions the Committee refused to make such a guarantee, although normally the underlying purpose of access—to obtain information—would be satisfied without publicizing it, and under some circumstances it may be unreasonable to ask for more.

A statutory approach may be suggested: upon written request by an agency head the committee chairman shall direct that the furnished information be considered in closed session at which he or a designated member, other than one implicated in the original request for information, shall be present. Upon executive request, top secret material shall be limited to scrutiny by a few members designated by the presiding officer of the relevant House. Before such materials are released to the public over the protest of the

Admiral after the Security Officer determined that she had failed to meet the security requirements of the installation. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).

⁶⁷⁰ In the course of the Walpole debate, Pitt said: "There are Methods, Sir, for preventing Papers of a very secret Nature from coming into the Hands of the Servants attending, or even of all the Members of our Secret Committee. If his Majesty should by Message acquaint us that some of the Papers sealed up and laid before us required the utmost Secrecy, we might refer them to our Committee, with an Instruction for them to order only two or three of the Number to inspect such Papers, and to report from them nothing but what they thought might be safely communicated to their whole Number. By this Method, I hope, the Danger of a Discovery would be effectually removed; therefore this Danger cannot be a good Argument against a Parliamentary Inquiry." 13 CHANDLER 173-74.

One hundred years later a Committee of the House of Representatives said: "Information . . . may be referred to a committee under the charge of secrecy until an examination of it can be made, when, if the committee concur in opinion with the Executive, its publication will be dispensed with. This is the true parliamentary course. It furnishes at once a security against secret abuses and the irresponsibility of public officers and agents which would follow the denial of the right of the House to demand information, and at the same time protects the State against the discovery of facts so important for the time to be concealed." H.R. REP. NO. 271, 27th Cong., 3d Sess. 7 (1843). The House Committee found "no warrant in the Constitution" for the presumption "that those interests would be more safe in his [the President's] keeping than in that of the House."

⁶⁷¹ BARTII 37-38. Hamilton, so said Madison, complained "of the House, because the members did not go to his office and ask information, instead of requiring it to be publicly reported." 3 ANNALS OF CONG. 947 (1793).

⁶⁷² ATT'Y GEN. MEMO. 21; KRAMER & MARCUSE 842.

agency head, the issue shall be processed through machinery hereinafter suggested⁶⁷³ and submitted to the courts. It would always be open to a court to direct that disclosure be confined to closed hearings. From time to time there may be the lone member who will defy judicial and congressional injunctions of secrecy. A judicial system which has not hesitated to hold the Solicitor General and the Secretary of Commerce in contempt⁶⁷⁴ would not draw back from teaching a defiant Congressman respect for law. For the infrequent maverick Congress itself has at hand censure and possibly the contempt power to chasten one who departs from its standards. A member of the House was "censured for divulging secret correspondence" in the early days of the republic.⁶⁷⁵ During World War II Parliament rigorously policed alleged breaches of its security by Members and "constituted itself the jealous guardian of its own orders of secrecy."⁶⁷⁶ A Congress which lays claim to sharing grave secrets must accept the responsibility of preserving their secrecy.

⁶⁷³ See p. 1335 *infra*.

⁶⁷⁴ See text accompanying notes 329-30 *supra*.

⁶⁷⁵ 5 ANNALS OF CONG. 443 (1796). The House likewise censured John Randolph for writing to President Adams in a style that was "improper and reprehensible." 2 Page SMITH 1023.

The power of Parliament to commit its own members for contempt stretches back to the 16th century and was judicially confirmed in *Burdett v. Abbott*, 14 East. 1, 104 Eng. Repr. 501, 555, 557 (K.B. 1811). I have found no case in which Congress attempted to hold a member in contempt, although there is a statement by Congressman Findley in 1793, asserting the most sweeping contempt power. See note 627 *infra*.

U.S. CONST. art. I, § 5(2) provides that: "Each House may . . . punish its members for disorderly behaviour, and . . . expel a member." A dictum stressing punishment for "disorderly behavior" or for "refusal to obey some rule on that subject made by the House for preservation of order" appears in *Kilbourn v. Thompson*, 103 U.S. 168, 189-90 (1880). Earlier, Mr. Justice Johnson, implying a general congressional power to punish non-members for contempt in the face of the express grant limited to members, explained that "the exercise of the powers given over their own members, was of such a delicate nature, that a constitutional provision became necessary to assert or communicate it . . . [S]ome such provision was necessary to guard against [the states'] mutual jealousy since every proceeding would indirectly affect the honor of interests of the state which sent him." *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204, 234 (1821).

In the Convention records, Edmund Randolph's scheme for a Constitution contains a "quaere how far the right of expulsion may be proper," 2 FARRAND RECORDS 140. That "quaere" dropped from sight. Two Wilson drafts contain the statement "may expel a member, but not a second time for the same offense." *Id.* at 156, 166. From this last, we may conclude that expulsion for an "offense," minimally against the respective houses, was contemplated. What is the effect of the "punishment for disorderly behavior" phrase? I suggest that expulsion for "disorderly conduct" was deemed too drastic and the sanction was limited to punishment short of expulsion. It does not follow that Congress is powerless to "punish" for an "offense" of a different order. The power to expel comprehends a power to impose a less severe sanction, e.g., confinement for contempt in defying an injunction to preserve secrecy in a matter touching national security. This was the power historically exercised by Parliament and there is no evidence that the Framers intended to deny it to Congress.

⁶⁷⁶ Parry 762-68.

Third, Professor Bishop argues for preservation of privacy for derogatory information in executive files.⁵⁷⁷ This is truly a "compelling" consideration.⁵⁷⁸ But distressing as needless publicity of such matters has often been, it is an issue of decency, of protection of the individual against what Taylor has termed "indecent exposure."⁵⁷⁹ The citizen's protection against Congress has not been confided finally to the executive departments, root and branch the creation of Congress.⁵⁸⁰ Historically the claim of an inherent executive power to withhold "derogatory" materials stands on none too solid ground. The Walpole Select Committee refused recognition even to a claim of privilege against self-incrimination;⁵⁸¹ and on the first occasion that Jefferson lectured Congress on the need for protection of the innocent he in fact made a complete disclosure.

This tenderness for "derogatory" information ill becomes an executive branch that time after time has placed the individual in cruelly humiliating circumstances without disclosure for the protection of his interest⁵⁸² and has not hesitated to reveal the most "derogatory" information when it served its own political purposes.⁵⁸³ It is not necessary to maintain that "Congress is the paladin of civil liberties and the executive their foe"⁵⁸⁴ for it suffices that the pot cannot call the kettle black. This is not to suggest that reputations of innocent men are to be flung to the dogs but rather to question whether the executive can lay claim on either moral or legal grounds to being the sole and final judge of what Congress may safely see. The individual here as elsewhere must look to the courts for protection against both the President and Congress.

I would not intimate that judicial protection renders congressional self-improvement unnecessary. Congressional lynching-bees have lessened respect for Congress and have shaken the deep-seated

⁵⁷⁷ Bishop 487.

⁵⁷⁸ BARTH 32; TAYLOR 106.

⁵⁷⁹ *Id.* at 85.

⁵⁸⁰ The "chief executive departments are all the work of the first and succeeding Congresses. No constitutional duty demanded their institution; no constitutional duty demands their continuance." Landis 196. This is even more plain in the case of the "independent" agencies which were meant to be the "arm of Congress."

⁵⁸¹ 13 CHANDLER 224-25.

⁵⁸² *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). *Cf.* note 539 et al.; *Greene v. McElroy*, 360 U.S. 474 (1959), discussed at text accompanying notes 456-58 *supra*; *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950). GELLHORN & BYSE 49, refer to the "notorious insensitivity with which the Immigration and Naturalization Service at times discharged its duties. . . ."

⁵⁸³ Compare Attorney General Brownell's summary in "considerable detail" on television of a "Top Secret" FBI report after the death of Harry Dexter White, to show that White, who had denied these charges under oath before a House Committee, "was known to be a Communist Spy," an incident which Barth describes as "flogging the dead body" of White. BARTH 91-92, 131.

⁵⁸⁴ Bishop 489.

conviction of the American people that they "must look to representative assemblies for protection of their liberties."⁵⁸⁵ The sadistic spectacle of Senator McCarthy publicly lashing the helpless General Zwicker, for example, was revolting to a sense of fair play.⁵⁸⁶ All this to make political hay at the cost of hapless public servants. Fear of exposure to such humiliation must deter able men from entering public service. A step in the right direction was taken by the House in the Fair Play Rules of 1955.⁵⁸⁷ But it was only a beginning. Not just better rules, but a heightened sense of responsibility for their enforcement and calling a halt to the unjustified smearing of public officials are required. The quest for inefficiency and corruption, or for information, need not be converted into a witchhunt with all too frequent resort to a pillory. Respect for the individual, it cannot too often be emphasized, is the cornerstone of democracy, and when Congress permits its own members unjustly to tear the individual down, it shakes the entire democratic structure. We are entitled to look to Congress itself for protection from its irresponsible members, and resort to the courts for the protection against them should be a last ditch and, hopefully, unnecessary step.

Finally, our solicitude to guard against misuse of derogatory information in executive files must not blind us to the fact that

absence of a legislative check—or of any publicity—may promote gross irresponsibility or carelessness in an executive agency—which is especially dangerous in a police agency such as the FBI. So long as its reports are kept confidential, appraisal of its methods, its sources, its reliability, and its judgment is extremely difficult.⁵⁸⁸

Fourth, Professor Bishop argues that the interchange of opinions which precedes a policy decision requires shelter; that subordinates who advise superiors "should be able to present unpalatable facts and make unpopular arguments without fear of being dragooned by the first Congressman who needs a headline." The "most compelling illustration," says Professor Bishop, is found in the "operation of the employee security system," citing the Army's repulse of McCarthy's attempt to subpoena individual members of the Appeals Board employed in the screening of employee security cases.⁵⁸⁹ On the hunt for "any members of the old

⁵⁸⁵ *Myers v. United States*, 272 U.S. 52, 294-95 (1926) (Brandeis, J., dissenting, joined by Holmes, J.).

⁵⁸⁶ The Senator told the General that "he was unfit to wear the uniform on which were sewn the General's decorations for heroism in the service of his country." TAYLOR 87.

⁵⁸⁷ See Newman, *Some Facts on Fact-Finding by an Investigatory Commission*, 13 AD. L. BULL. 120, 123 (1960-61).

⁵⁸⁸ BARTH 39.

⁵⁸⁹ Bishop 487-88; Kramer & Marcuse 671-74.

Administration who hid communists," McCarthy was barred because the "loyalty boards were quasi-judicial in character."⁶⁰⁰ A Special Senate Committee which later looked into the Army-McCarthy imbroglio rejected immunity from subpoena but indicated that there "may be many subjects on which they should not be forced to testify," spelled out by the minority as freedom from testifying as to "the reasons for their judicial determinations."⁶⁰¹ If we accept the premise that these appeals boards were exercising judicial functions, as now seems requisite,⁶⁰² then their immunity from probing into the processes whereby they arrived at their decisions is clear.⁶⁰³ Manifestly, however, this example does not stretch to exclude every internal communication by every governmental subordinate.

There may be more than meets the eye in the executive argument that employees must be "free to disagree with their superiors without being subject to later hearings as whether they were right or whether they were wrong."⁶⁰⁴ The subordinate who was "right" will not complain of disclosure, for that only vindicates his judgment. Frequently it is salutary to disclose that the chief ignored the sound advice of a subordinate who, for example, better resisted "influence" than a politically oriented chief. Often, too, subordinates who differ with their superiors are eager to voice their differences.⁶⁰⁵ Spectacular

⁶⁰⁰ *Id.* at 672, citing S. REP. No. 2507, 83d Cong., 2d Sess. 60 (1954).

⁶⁰¹ Kramer & Marcuse, 374-75.

⁶⁰² Cf. discussion of *Greene v. McElroy*, at text accompanying notes 456-58 *supra*.

⁶⁰³ *United States v. Morgan*, 313 U.S. 409, 422 (1941). In *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960), the plaintiff, for purposes of tax court review of the Renegotiation Board's determination of excess profits, subpoenaed all the files relating to the renegotiation. As to some of the documents, the Board contended that its "members would be inhibited in their deliberations," *id.* at 657, and the court held that with respect to "recommendations as to policies which should be pursued by the Board, or recommendations as to decisions which should be reached by it, the claim of privilege is well founded." *Id.* at 660.

The reasons for shielding the judicial decision-making process do not appear to have the same force in the realm of policy making as will hereafter appear.

⁶⁰⁴ Quoting Assistant Attorney General Hansen, Kramer & Marcuse 887. For similar views in a private litigation see *Kaiser Alum. & Chem. Corp. v. United States*, summarized at note 494 *supra*.

The fact that President Eisenhower "waived" the withholding directive in the Dixon-Yates investigation, Kramer & Marcuse 691, and that ICA turned over an internal audit report on Iran, *id.* at 663, suggests that "candid interchange" is a matter of convenience rather than inexorable administrative necessity, as is more strikingly illustrated by the total (but for one incident) stoppage of such withholding by President Kennedy, note 6 *supra*. See note 514 *supra*.

⁶⁰⁵ When the Department of Justice waived the "candid interchange" rule, a former attorney of the Antitrust Division testified that "he was critical of the proposed settlement of the A.T. & T. case, and that he refused to sign the proposed consent decree." Kramer & Marcuse 889 n.746. The interest of the Congress in how the antitrust program is being enforced surely justified inquiry into what ingredients

illustration is furnished by testimony of sundry generals and admirals before a Senate Committee investigating why a \$6,500,000,000 contract for the "TFX experimental plane" was awarded to General Dynamics Corporation rather than to Boeing Company.⁵⁰⁶ These "subordinates" appeared in opposition to Secretary of Defense McNamara, and before long one head rolled, that of Admiral George W. Anderson, Chief of Naval Operations.⁵⁰⁷ There is no reason to denigrate Secretary McNamara's heroic attempt to rationalize the three intractable Services and to assert control over swollen military budgets and often inept planning. Nevertheless it would be unreasonable to ask Congress to appropriate such staggering sums without being apprised of conflicting views of the experts.⁵⁰⁸ As to the subordinate who was "wrong," another commentator who is in government service says that "it is self-evident that the hapless Department head who is criticized for a bad decision will use his authority to rid himself of the advisor who gave incompetent advice."⁵⁰⁹ If this be so, the basis of "candid interchange," the "protection" of the subordinate's freedom to differ, goes down the drain.

"Once it has been ascertained that a responsible official . . . has made a mistake," it has been asked, why should Congress seek to determine "whether the mistake . . . was caused by faulty internal advice?"⁵⁰⁰ Often the "mistake" emerges only when we learn of the "internal advice." In the Dixon-Yates case the "mistake" came to the surface only when Congress uncovered the conflicting interests of the key "internal advisor." If Congress is to expose corruption and waste it cannot stop with pinning the mistakes on the head who more often than not is totally unaware of their presence. The efficiency of a vast department turns on the operations of its sprawling components, operating tier on tier, and its deficiencies are not always apparent to the overburdened head, as one Congressional investigation after another has revealed, and as the recent malodorous handling of grain elevator benefits to Billie

entered into a consent decree with one of the most important of the antitrust defendants. One branch of the Department of Justice refusal to furnish documents, resting on the confidential nature of the turn over by A.T. & T., was promptly made ridiculous by A.T. & T.'s voluntary turn over, supplemented by turnovers made by the Department of Defense and the Federal Communications Commission. Kramer & Marcuse 887, 891, 913.

⁵⁰⁶ N.Y. Times, March 29, 1963, p. 1 (Western ed.); Los Angeles Times, March 28, 1963, p. 1.

⁵⁰⁷ N.Y. Times, May 7, 1963, p. 1 (Western ed.).

⁵⁰⁸ Judge Learned Hand thought Congress was entitled to know. See text accompanying note 513 *supra*.

⁵⁰⁹ Philos 54.

⁵⁰⁰ Kramer & Marcuse 915.

Sol Estes by the Department of Agriculture freshly illustrates.⁶⁰¹ Of these peculations an upright Secretary of Agriculture, Orville Freeman, was quite unaware. It was more important to trace the conflicts of interest and sloppy administration that operated behind the scenes in the Pakistan Elevator case than to pin responsibility for rejecting the low bid on the head.⁶⁰² As Chairman Celler asked in another situation, "how can we find out whether there has been dereliction unless we know some of those facts?"⁶⁰³ If "efficiency" is to be promoted, the investigator must determine "what information was available and upon what basis that final decision was made."⁶⁰⁴ Nor does executive resistance to exposure of strong-smelling administration that Congress has met again and again inspire confidence in the exercise of executive prerogative finally to determine when exposure is required.⁶⁰⁵

Professor Bishop's summary of preliminary mechanics employed by the executive branch in handling legislative inquiries further illuminates the problem. First, "no fishing expeditions are allowed," but congressional investigators "must define with reasonable precision . . . the character of the documents they wish to see."⁶⁰⁶ This is a remarkable requirement, coming after the executive branch prevailed upon the courts to discard the "colorful and nostalgic slogan 'no fishing expeditions'" and to clothe an agency with a "power of inquisition" so that it can "investigate merely on suspicion that the law is being violated."⁶⁰⁷ Thus the traditional power of the "Grand Inquest" would now be saddled with a limitation that the newcomer in government found galling. Assistant Attorney

⁶⁰¹ Time Magazine, May 25, 1962, p. 24.

⁶⁰² See notes 513-14 *supra*. In England the Minister accepts the "whole shock of any political attack" and it is a convention that those who "advised ministers or what advice has been given" are shielded from inquiry. WADE 16. The English career service enjoys an enviable reputation and this course enables a civil servant to work in an "atmosphere of detachment." *Ibid.* But the price is high: such anonymity encourages his "occupational love of secrecy," *ibid.*, and "a civil servant's misconduct seems more likely to cause the downfall of his minister than of himself." *Id.* at 233. Perhaps the sheer bulk of our administrative establishment argues for a different rule—the price of misdoing by some obscure employee should not be Orville Freeman's head. Moreover, the "doctrine of ministerial responsibility [in England] makes it difficult for a Minister to admit that he has made a mistake—or, which is more serious still, that his department has made a mistake." WADE, TOWARDS ADMINISTRATIVE JUSTICE 99 (1963). As Professor Wade sapiently observes: "Unwillingness to admit mistakes is quite strong enough in the human character as it is, without any constitutional reinforcement." *Id.* at 101.

⁶⁰³ Kramer & Marcuse 887.

⁶⁰⁴ Chairman McClellan, quoted *id.* at 836.

⁶⁰⁵ See text accompanying notes 515-30 and note 31 *supra*.

⁶⁰⁶ Bishop 489.

⁶⁰⁷ United States v. Morton Salt Co., 338 U.S. 632, 642 (1950).

General Hansen "admitted that it might be difficult for a subcommittee to make demands for specific documents without having examined the files,"⁶⁰⁸ as Professor Schwartz learned when he was cast in the role of investigator.⁶⁰⁹

For his second point, Professor Bishop lays down that:

No "raw" files are to be released. The files requested will be screened by the legislative liaison officer or one of his assistants, who will remove any documents which, in his judgment . . . should not go outside the executive branch. There can be no blinking the fact that this affords an opportunity for serious abuse. . . . [I]t is most certainly unjustifiable to remove part of a file simply because it betrays administrative stupidity or inertia [or worse]. The temptation to indulge in such an abuse is, of course, considerable.⁶¹⁰

In the less polite parlance that callous government attorneys employ when the shoe is on the other foot, the executive branch is accustomed to "stripping the files." Consider the raucous outcries that would fill the air were government attorneys to uncover such a practice in a subpoena enforcement proceeding. Note too that an assistant of the "liaison officer" may make the judgment of what Congress may see so that a "stripped" document may never come to the surface, thus leaving no room for a judgment by the department head whether the document should be withheld.⁶¹¹

Finally, what of the possible "abuses" that are so cheerfully conceded? Professor Bishop first concludes that the risks of such abuse are "less than the risk inherent in giving Congress free access to executive files."⁶¹² Free access may carry with it the risk that some irresponsible member of Congress may trumpet a "military secret" to the world, but such risks are surely outweighed by the perils of concealing executive derelictions in a multi-million executive staff which administers and disburses vast sums, or of hiding some ill-advised foreign adventure. Second, suggests Professor Bishop, competent department heads learn about "honesty as a policy in their dealings with Congress."⁶¹³ Some very competent heads, however, have failed to learn that "homely maxim," as the Dixon-Yates, the Pakistan Grain Elevator, the burned Farm pamphlets and other heel-dragging incidents illustrate.⁶¹⁴

⁶⁰⁸ Kramer & Marcuse 890.

⁶⁰⁹ Schwartz 4.

⁶¹⁰ Bishop 489-90.

⁶¹¹ Congress is deeply resentful if "'subordinate officials who never see the President' seem to determine what Congress may know." Kramer & Marcuse 911.

⁶¹² Bishop 490. But compare notes 30, 31 and 41 *supra*.

⁶¹³ Bishop 490.

⁶¹⁴ See text accompanying notes 516-28, and notes 30-31 *supra*. With two of Professor Bishop's suggestions I am in accord: (1) congressional recipients of highly

A last practical consideration: after noting the secrecy that surrounds the deliberations of "judges in their chambers, and of grand juries," Taylor concludes that "the executive branch, too, may claim that it is not required to plan and conduct all of its operations in a goldfish bowl."⁶¹⁵ Certainly the alternative is not to conduct all its operations in a darkroom, as tended to become the rule in the Eisenhower regime. For such operations as really demand a darkroom, disclosure to Congress need not mean disclosure to the public, for Congress itself can and should limit scrutiny to select members. Grand jury proceedings are an exception to "this nation's historic distrust of secret proceedings," deeply rooted in our history and long antedating the adoption of the Constitution.⁶¹⁶ If only there were a like tradition of "executive" secrecy! Then too, the grand jury is an investigating tribunal of constantly changing members, having no built-in yearning to conceal its own mistakes or misdeeds.⁶¹⁷ Nor does the comparison of judicial deliberations with those of executive employees stand any better. All told there are some 500 or 600 federal judges as against upwards of 2,500,000 federal employees. The problems of safeguarding these two against inefficiency, corruption and waste are simply incommensurable.⁶¹⁸

"Judicial deliberations" are better compared to conferences between the President and a Cabinet member, for which a privilege was recognized in *Marbury v. Madison*,⁶¹⁹ of Presidential communications with other high military or civil officers,⁶²⁰ which at least one congressional committee recognized.⁶²¹ But it is far-fetched to compare the conferences of two lowly subordinates, or of a subordinate with a lower echelon chief, with consultation between a

classified information should themselves be subjected to a security check, if only because strange characters do from time to time find their way into Congress. (2) The executive should have a chance to comment on a committee report before it is published in order to avoid bona fide mistakes. Nothing so promotes cooperation, and is better calculated to facilitate the quest for information, than to remove the matter from the front pages.

⁶¹⁵ TAYLOR 86.

⁶¹⁶ *In re Oliver*, 333 U.S. 257, 273 (1948); 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 322 (3d ed. 1922).

⁶¹⁷ Mr. Justice Douglas reminded us that commissions "tend to acquire a vested interest in that role." *Hannah v. Larche*, 363 U.S. 420, 499 (1960) (dissenting opinion).

⁶¹⁸ The fact that the executive branch cannot peer into congressional files, as is noted by TAYLOR 105, and Bishop 478, may be similarly explained. Historically, furthermore, the Grand Inquest could inquire into executive conduct whereas there seems to be no precedent for a reversal of roles.

⁶¹⁹ 1 Cranch (5 U.S.) 137, 144-45 (1803). Attorney General Rogers quotes Marshall, C.J., as saying in the Burr Trial respecting *Marbury v. Madison* that "the principle decided there was that communications from the President to the Secretary of State could not be extorted from him." Att'y Gen. Memo. 34.

⁶²⁰ KRAMER & MARCUSE 683, 709

⁶²¹ *Id.* at 873.

judge and his immediate aide or the President with a department head. And it needs emphasis that not even a judge is beyond the scope of legislative investigation, else the impeachment power would be shackled. The oft-cited example of Judge Louis Goodman's refusal on behalf of himself and his fellow district judges in California to testify before a congressional committee, apparently as to their conduct of judicial proceedings,⁶²² reflects the view that "such an examination of a judge would be destructive of judicial responsibility."⁶²³ But this spells no immunity from investigation into judicial misconduct,⁶²⁴ which if infrequent has yet bobbed up from time to time.⁶²⁵

The plain fact is that the executive branch was *meant* to operate in a goldfish bowl. That is one of the presuppositions of democratic government, perceived almost from the outset:

No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual impositions and abuses, which were imperceptible, only because the means of publicity had not been secured.⁶²⁶

The alternative to a "goldfish bowl" cannot be uncontrolled executive discretion to withhold from Congress for, as the Eisenhower era teaches, that conduces to a mushrooming cloud of concealment. Dress it decorously as you will, in the last analysis executive discretion to determine what Congress shall see empowers the executive branch to determine how far it needs to be investigated. "If men were angels" then we could safely lodge that power in the subject of investigation.

Congress is not without means of self-help. As Professor Bishop reminds us:

Congress undoubtedly has power to punish contempts without invoking the aid of the executive and the judiciary, by the simple forthright process of causing the Sergeant at Arms to seize the offender and clap

⁶²² BARTH 80; TAYLOR 96-97.

⁶²³ *United States v. Morgan*, 313 U.S. 409, 422 (1941).

⁶²⁴ "Where the secret is a judicial secret such as the proceedings of a judicial conference preparatory to writing an opinion, it may be that there is a privilege belonging to the judiciary, but that has not been decided, and might turn on whether the investigations were with a view to legislation or to impeachment." Wyzanski 99.

⁶²⁵ BORKIN, *THE CORRUPT JUDGE* 219-58 (1962).

⁶²⁶ Statement by Edward Livingston, a great early American lawyer and legislator. Quoted in *Reynolds v. United States*, 192 F.2d 987, 995 (3d Cir. 1951). See also notes 111-18 *supra*. Cf. text accompanying note 119 *supra*.

him in the common jail of the District of Columbia or the guardroom of the Capital Police.⁶²⁷

If "Congress has never in the past been willing to push matters" to the point of directing the Sergeant at Arms to seize the person of an executive officer,⁶²⁸ it is not for lack of power but rather a tribute to Congress' good sense. Recent resistance by Alabama soldiers to service of federal process on Governor Wallace illustrates how unseemly a spectacle would be the repulse of the Sergeant-at-Arms by a cordon of federal soldiers.⁶²⁹ That could only serve to bring both branches into disrepute, to convert a grave constitutional issue into a common brawl. Regression to the jungle of self-help in any form, whether by withholding vital appropriations, or abolishing recalcitrant agencies, or seizing executive recalcitrants, represents an undesirable solution to conflicting claims of constitutional power. It would substitute a meat cleaver for temperate arbitrament. No more than the President should Congress impose its construction on the opposite branch by *force majeure*. It is to avoid such self-help that we turn to the courts.

IX. JUSTICIABILITY OF THE CONFLICT BETWEEN CONGRESS AND THE EXECUTIVE BRANCH

A necessary preliminary to the question of justiciability involves the mechanics of entry into the courts for resolution of the legislative-executive conflict. The district courts presently have "original juris-

⁶²⁷ Bishop 484. See *Jurney v. MacCracken*, 294 U.S. 125 (1935); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

The legislative contempt power has its roots deep in parliamentary history and was employed by the Congress from the beginning. See Berger 611, 620. Congressman Findley had asserted the power in the House of 1793: "It is solely in the power of this House to punish all contemptuous or indecent treatment of its authority. . . . We might have ordered him [Secretary of the Treasury Alexander Hamilton] to the bar of this House and obliged him to make proper acknowledgments." 3 ANNALS OF CONG. 963 (1793).

It will be recalled that Nicholas Paxton, Solicitor of the Treasury, was imprisoned during the course of the Walpole inquiry. 13 CHANDLER 139. Brass Crosby, Lord Mayor of London was imprisoned later. Brass Crosby Case, 3 Wilson 189, 95 Eng. Rep. 1005, (K.B. 1771). Explaining judicial non-interference with Parliamentary contempt commitments, Blackstone says, "if any persons may safely be trusted with this power, they must surely be the Commons, who are chosen by the people." *Id.* at 205, 95 Eng. Rep. at 1014. See note 66 *supra*.

An early Massachusetts case sustained the power of the legislature to "imprison" an official "for contempt" for refusing to produce papers, saying that as "the grand inquest for the Commonwealth, [it] . . . has power to inquire into the official conduct of all officers of the Commonwealth. . . ." *Burnham v. Morrissey*, 80 Mass. (14 Gray) 226, 230, 239 (1859).

⁶²⁸ Bishop 485.

⁶²⁹ Time Magazine, June 21, 1963, pp. 13-14. The importance of "settling grievances peacefully in the courts" was stressed in *United States v. Mississippi*, 85 Sup. Ct. 808, 817 (1965).

diction of all civil actions . . . commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."⁶³⁰ Under this act it has been held that a Senate committee authorized by Senate Resolution to investigate senatorial election frauds was not "authorized to sue,"⁶³¹ but that turned on the lack of express authorization. Unless we consider that the United States is exclusively identified with the executive branch, a suit on behalf of the legislative branch is no less in the interest of the United States. And notwithstanding the Court's reservation in passing whether suit would lie on behalf of one House alone, such suit should stand no lower than suit on behalf of a single Department, which can be "commenced by the United States."⁶³² Apparently a department or agency of the executive branch would be authorized under the terms of the above quoted statute to file suit for a declaratory judgment whether it is entitled to withhold information required from it by a congressional committee. Suppose that a suit for a declaratory judgment on behalf of some branch of the Executive is "commenced by the United States," and suppose that Congress desires to file a cross-complaint to compel delivery of required information, can the words "commenced by the United States" be construed to permit each of the opposing parties to be "the United States?" Clarifying legislation might well obviate litigation over such questions, over the issue whether such suits present "political questions," and insure that both branches enjoy reciprocal rights.⁶³³

⁶³⁰ 28 U.S.C. § 1345 (1949).

⁶³¹ *Reed v. County Comm'rs*, 277 U.S. 376 (1928). The holding of the case is narrow: The Court declined to construe the Senate authorization to the Committee "to do such other things as may be necessary in the matter of said investigation" as authorizing suit, largely because of the practice of both Senate and House to rely on their "own power to compel" testimony. In passing, the Court threw doubt on the power of one House acting alone to sue, saying "even if it be assumed that the Senate alone may give that authority." *Id.* at 388-89.

The Committee impressively argued (p. 379) that "Any suit brought in the exercise of a constitutional power of the United States on behalf . . . of any of its judicial, legislative or executive agencies, is a suit in which the United States is the real party in interest. . . . It may not be said that the National Government has a less interest in the execution of powers of the legislative branch of the Government than of the executive branch;" in other words, the "United States" is not exclusively identified with the executive branch.

But there is another obstacle. Representation of the United States is confined by statute to the Attorney General and to the District Attorneys. 5 U.S.C. §§ 309, 310 (1964); 28 U.S.C. § 507 (1964). Given a dispute between Congress and the executive branch it is to be anticipated that both would choose to represent the Executive rather than Congress. A statute should therefore provide that Congress may appoint attorneys to represent it.

⁶³² *Id.* at 377, 388-89.

⁶³³ Account should then be taken of statutes which confine representation of the United States to the Attorney General and the United States Attorneys. 5 U.S.C. §§ 309, 310 (1964); 28 U.S.C. § 507 (1964). Quære whether express provision for Congressional appointment of its own counsel is needed.

In developing such a procedure, the benefits of first escalating the issues for top-level evaluation merit consideration. Not all demands for information represent a considered congressional judgment. Too often they are pressed by headline-hunting members of Congress, and often the leadership finds itself trapped into a show-down that might have been averted by intervention at an earlier stage. Screening of executive refusals by President Kennedy caused a spectacular diminution of withholdings⁶³⁴ which, in the Eisenhower era, were often downright ludicrous. To stimulate study and design of a statutory procedure for the accomplishment of such objectives, the following is suggested: (1) If an executive officer declines to furnish information, the head of the agency, upon a written request by the congressional committee chairman, shall hold a closed hearing on the refusal, at which a representative of the committee shall be entitled to be heard; (2) If the head thereafter endorses his subordinate's refusal to produce, the request shall be put before the relevant legislative branch in order to obtain approval for the institution of a suit. Similarly, the institution of suit for declaratory judgment by an executive agency might be conditioned on prior approval by the President. Such machinery should go far to reduce needless harassment of the executive branch by hot-headed legislative investigators and to assure that agency heads will seriously review ill-considered bureaucratic refusals to furnish information. It would siphon off petty disputes, leaving only important issues for submission to the courts; and before long the courts would pick out guidelines that would further diminish the area of controversy.

Whether the conflicting claims of Congress and the executive branch respecting Congress' right to obtain information are justiciable needs to be considered from three standpoints: (1) "case or controversy," (2) "standing to sue," and (3) "political questions."

A. Case or Controversy

Suits wherein "part of the government appears before" the courts "fighting another part" are now a commonplace,⁶³⁵ yet judicial

⁶³⁴ See text accompanying notes 6 and 499 *supra*.

⁶³⁵ *FTC v. Ruberoid Co.*, 343 U.S. 470, 482-83 (1952) (Jackson, J., dissenting). See *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481 (1958); *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954); *United States v. FPC*, 345 U.S. 153 (1953); *ICC v. Inland Waterways Corp.* 319 U.S. 671, 683 (1943); *Miguel v. McCarl*, 291 U.S. 442, 450 (1934); *Summerfield v. CAB*, 207 F.2d 200 (D.C. Cir. 1953); *Stern*.

Such actions have been termed "routine" in the state courts. Note, *Judicial Resolution of Administrative Disputes Between Federal Agencies*, 62 *HARV. L. REV.* 1050 (1949). See *State Bd. of Educ. v. Levit*, 52 Cal. 2d 441, 343 P.2d 8 (1959) (proceeding by Board of Education to compel Director of Finance to comply with

cognizance of such conflicts in terms of case or controversy has received little analysis.⁶³⁶ One hundred years ago when the Treasury Department appeared in opposition to the Attorney General, the Court shortly stated that "where the United States is a party, and is represented by the Attorney-General . . . no counsel can be heard in opposition on behalf of any other of the departments of the government."⁶³⁷ In 1921, the Second Circuit, proceeding from the premise that "the same person cannot be both plaintiff and defendant in the same action" denied recovery to an insurer who had paid for an injury by a Central Railroad float to a New York Central Railroad tug because both roads had been taken over by the United States Railroad Administration, which had organized the roads "into a unified national system of transportation under a single head."⁶³⁸

In private litigation, it has been said, the same party cannot be both plaintiff and defendant, for "in that event, there is no real case or controversy";⁶³⁹ and the Supreme Court has stated that where one person owns the stock of two opposing corporations there is no controversy because he is "the *dominus litis* on both sides."⁶⁴⁰ Such cases, it has been suggested, are distinguishable because they involve collusive suits prejudicial to a third person;⁶⁴¹ and it has been argued that the rule has not been inflexibly applied.⁶⁴² Whatever may be the force of such arguments, when an agency that enjoys "complete autonomy"⁶⁴³ stubbornly opposes the view of a

its order to print books); *Morss v. Forbes*, 24 N.J. 341, 132 A.2d 1 (1957) (suit by county prosecutor to enjoin Legislative Committee from demanding confidential information).

⁶³⁶ Judicial analysis has lagged behind two very good student notes. See 62 HARV. L. REV. 1050 (1949); Note, *Res Judicata and Intra-Governmental Inconsistencies*, 49 COLUM. L. REV. 640 (1949).

⁶³⁷ *The Gray Jacket*, 5 Wall. (72 U.S.) 370, 371 (1866).

⁶³⁸ *Globe & Rutgers Fire Ins. Co. v. Hines*, 273 Fed. 774, 780 (2d Cir. 1921). This case represents an extreme application of the doctrine because the insurers of the railroad were the real party in interest.

⁶³⁹ *Defense Supplies Corp. v. United States Lines Co.*, 148 F.2d 311, 312-13 (2d Cir. 1945). This was a "dispute about the proper allocation of government funds between different parts of the government," i.e., between a government corporation and the United States. *Id.* at 313 n.5. The statute had directed that suits shall proceed under principles "obtaining in like cases between private parties" and the court reserved the "question whether such an action, even if authorized by statute, would be justiciable. . . ." *Id.* at 312, 313 n.5. The Defense Supplies rule was applied in *United States v. Easement & Right of Way*, 204 F. Supp. 837, 839-40 (E.D. Tenn. 1962).

⁶⁴⁰ *South Spring Gold Mining Co. v. Amador Medean Gold Mining Co.* 145 U.S. 300, 301 (1892).

⁶⁴¹ 62 HARV. L. REV. 1050, 1055 (1949); *Cf.* 49 COLUM. L. REV. 640, 644 (1949).

⁶⁴² 62 HARV. L. REV. 1050, 1055 (1949).

⁶⁴³ Stern 760. See note 651 *infra*. A number of other independent agencies enjoy the "same autonomy." Stern 763.

department and is outside the compulsion of the executive power,⁶⁴⁴ the facts are at war with a technical assumption that the two agencies are the "same person" or that there is a "*dominus litis*" who controls the litigation.

The absence of a "case or controversy" in this context was first raised before the Supreme Court in *United States v. ICC*.⁶⁴⁵ The United States had filed a complaint on behalf of the Army before the ICC for reparations from certain railroads. The ICC found the rates reasonable and dismissed, whereupon the United States brought suit in a three-judge district court to set aside the order. Faced with a statute which made the suit one "against the United States," with a suit naming the United States both as petitioner and defendant, with the Attorney General representing both—indeed, with the identical Assistant Attorney General signing both petition and answer—the district court not surprisingly concluded that "the Government may not sue itself. . . . Naturally there cannot be a controversy if the same party is both plaintiff and defendant."⁶⁴⁶ The Supreme Court recognized the general principle that "no person may sue himself," but it looked behind the names of the parties and found that the controversy was actually between the United States and the railroads about alleged overcharges in the past.⁶⁴⁷ Apparently aware, however, that this explanation would not explain cognizance of the recurring conflicts between two or more agencies, the court went on to say that the Attorney General's charge that the ICC order was "issued arbitrarily and without substantial evidence . . . alone would be enough to present a justiciable controversy. . . ."⁶⁴⁸ This statement may seem puzzling, because ordinarily an appeal from a judicial tribunal is not enough to give rise to a "controversy" with the tribunal, be its decision ever so arbitrary. In denying a claim to reparations, the ICC acted in a quasi-judicial capacity,

⁶⁴⁴ Congress, said *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935), could empower agencies such as the FTC to act "independently of executive control." Cf. *Wiener v. United States*, 357 U.S. 349 (1958).

⁶⁴⁵ 337 U.S. 426 (1949).

⁶⁴⁶ *United States v. ICC*, 78 F. Supp. 580, 583 (D.D.C. 1948). *Globe & Rutgers Fire Ins. Co. v. Hines*, 273 Fed. 774, 778 (2d Cir. 1921), had held that jurisdiction in such cases "depends upon the character of the party to the record, and the court does not inquire as to who may have an equitable interest in the suit."

⁶⁴⁷ 337 U.S. at 430-31. In *United States v. Easement & Right of Way*, 204 F. Supp. 837, 840 (E.D. Tenn. 1962), wherein the TVA sought in a condemnation suit to join the Farmers' Home Administration as holder of a mortgage on the land, the court expressed disbelief that *United States v. ICC* "overruled the elementary principle that a party may not sue himself," saying that there "the United States upon the one side and the railroads upon the other were the real parties in interest. . . . The case is . . . authority only for the proposition that adversary parties must in fact exist in order for a justiciable issue to exist. . . ."

⁶⁴⁸ 337 U.S. at 431.

and the injunction filed by the United States on behalf of the Army to set aside the ICC order was a form of appeal for purposes of review.⁶⁴⁰ But the quasi-judicial role of the ICC may be distinguished in this respect from that of a trial court, because it is part of a complex of functions, legislative, administrative and judicial, all of which are employed to effectuate a statutory policy; and the agency is no less entitled to protection for its judicial than it would ordinarily receive for its administrative functions.⁶⁵⁰ This would seem to flow from the congressional authorization to the ICC to maintain its position even though the Attorney General took a contrary view, without regard to whether the function was legislative, administrative or judicial.⁶⁵¹

And it receives some confirmation from *ICC v. Jersey City*,⁶⁵² wherein a railroad sought a rate increase which the ICC authorized over the protest of Jersey City and the federal Price Administrator. Jersey City then brought suit to set the order aside; the Price Administrator intervened, alleging that the increase was "in violation of the Stabilization Act." It is possible to view this as a controversy between the railroad and Jersey City to which the dispute between the ICC (in its rate-making capacity) and the Price Administrator was ancillary. But the Court made no mention of the fortuitous fact that the controversy arose out of a "privately" initiated suit and emphasized rather that the controversy was "between two governmental agencies as to whether the powers of the one or the other are preponderant in the circumstances."⁶⁵³ The resolution of such intergovernmental disputes, which involve the fortunes of major statutory schemes having great national importance, should not

⁶⁴⁰ That the injunctive procedure under the Urgent Deficiencies Act was merely a review procedure was confirmed by the Review Act of 1950, § 1, 64 Stat. 1129 (1950), 5 U.S.C. §§ 1031-42 (1953), which provided that the earlier act should "no longer govern review of orders of the Federal Maritime Communications Commission, the Secretary of Agriculture, and the Maritime Commission." GELLHORN & BYSE 223. See also 3 DAVIS § 23.04.

⁶⁵⁰ Cf. text accompanying notes 701, 702 *infra*.

⁶⁵¹ From the outset, the ICC was authorized to appear "as of right," to "be represented by their own counsel," and the Attorney General was ordered not to "dispose of or discontinue" an ICC suit "over the objection" of the ICC. 28 U.S.C. § 2323 (1949). See *ICC v. Oregon-Washington R.R.*, 288 U.S. 14, 23-24 (1933).

⁶⁵² 322 U.S. 503 (1944).

⁶⁵³ *Id.* at 523-24. Cf. *id.* at 519. In *ICC v. Inland Waterways Corp.*, 319 U.S. 671, 683 (1943), the Attorney General did not participate because "of a conflict in litigation between coordinate agencies . . . the Agricultural Adjustment Administration and the ICC." Compare the attack by the Price Administration on the ICC in *Alabama v. United States*, 56 F. Supp. 478, 483 (W.D. Ky. 1944), because of "failure properly to interpret and apply its constitutional and statutory authority to protect interstate commerce from undue and unreasonable burdens from intrastate commerce and also by its failure to accommodate the exercise of its powers to the congressional policies embodied in the Emergency Price Control Act. . . ."

hinge on the accident that the suit is initiated by a private party rather than by an agency that claims its functions are being impaired by another agency.

The Supreme Court took in stride a suit initiated by a department wherein it complained of just such impairment. In *United States ex rel. Chapman v. FPC*,⁶⁵⁴ the Secretary of the Interior petitioned to set aside a license issued by the FPC to a private power company on the ground that his "duties relating to the conservation and utilization of the Nation's water resources" were "adversely affected by the Commission's order." Without mention of "case or controversy," the Court held that the Secretary had standing to sue.⁶⁵⁵ Presumably implicit in the holding is the assumption that there was a "controversy," for without it there could be no jurisdiction.⁶⁵⁶

That assumption fits handily into orthodox notions of "case or controversy." A "controversy" is presented, in the words of Chief Justice Taney, when there is a "real dispute between the plaintiff and defendant," the antithesis of an "interest in the question" which is "one and the same."⁶⁵⁷ When one branch of the government maintains that another is unlawfully depriving it of rights conferred upon it either by Constitution or statute, and that charge is controverted, there is such a "real dispute," and there is no "common interest"

⁶⁵⁴ 345 U.S. 153 (1953).

⁶⁵⁵ *Id.* at 156. Mr. Justice Frankfurter stated that the cases involved "a conflict of view between two agencies of the Government having duties in relation to the development of national water resources." *Id.* at 155. *Cf.* *United States v. FPC*, 191 F.2d 796, 800 (4th Cir. 1951).

⁶⁵⁶ The presence of "parties having adverse legal interests" continues to be the criterion of "case or controversy." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). *Cf.* *Public Util. Comm'n v. United States*, 355 U.S. 534, 536 (1958); *Stephenson v. Stephenson*, 249 F.2d 203, 208 (7th Cir. 1957).

⁶⁵⁷ Lord v. Veazie, 49 U.S. (8 How.) 250, 254 (1850). More recently the Supreme Court said that there is a "controversy" where there is "a dispute between parties who face each other in an adversary proceeding . . . [who] had taken adverse positions with respect to their existing obligations." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937). There "is an actual controversy . . . where one side makes a claim of a present, specific right and the other side makes an equally definite claim to the contrary. . . ." *Stephenson v. Stephenson*, 249 F.2d 203, 208 (7th Cir. 1957). In a concurring opinion in *State v. Cunningham*, 81 Wis. 440, 486, 51 N.W. 724, 730 (1892) (in which the rest of the court apparently concurred), Judge Pinney said of a suit by the state on the relation of the Attorney General against the Secretary of State, invoking the original jurisdiction of the Supreme Court: "We have, then, all the essential elements of a judicial controversy proper for the determination of a court of justice. There is a controversy between the state, as a political organization suing by its attorney general, and the respondent, in relation to the discharge of a purely ministerial duty, concerning matters respecting the sovereignty . . . of the state . . . which is matter cognizable in this court. . . ." *Id.* at 507, 51 N.W. at 737.

in obtaining the same decision.⁶⁵⁸ And when the disputants are Congress and the executive it would be sheer conceptualism to regard the United States as the "*dominum litis*," for aside from the "people" to whom an appeal on this issue is unfeasible and remote, there exists no organ or body but the courts which can compel them to reconcile their differences. Such conceptualism is the less inviting when it collides with the deep-rooted interest in insuring that officials remain within bounds,⁶⁵⁹ a consideration that steadily grows in importance as more and more delegation is the order of the day.

There is no historical compulsion to read the case or controversy phrase restrictively. A "case" was defined by Chief Justice Marshall as a "suit instituted according to the regular course of judicial procedure."⁶⁶⁰ In "regular course" the English courts entertained suits by the Attorney General against public officials;⁶⁶¹ and suits by an Attorney General to keep an official within bounds have long been accepted as a staple of judicial business.⁶⁶² As Judge

⁶⁵⁸ Compare 3 DAVIS 292: "Whenever a private party who is in fact adversely affected asserts that administrative action is illegal, and whenever the defendant in the proceeding asserts that the action is legal, the technical requirement of 'controversy' is met."

⁶⁵⁹ See Jaffe 1274, 1276, 1280, 1296; 3 DAVIS 248. Commenting on Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), Professor Davis suggests that "the companies which are adversely affected by the asserted misinterpretation of the statute" might well be "enlisted as natural law enforcers, whether or not the legal right of the companies is violated." *Id.* at 220.

⁶⁶⁰ So states *Muskrat v. United States*, 219 U.S. 346, 356 (1911).

⁶⁶¹ "[O]ne touchstone of justiciability to which this Court has frequently had reference is whether the action sought to be maintained is of a sort 'recognized at the time of the Constitution to be traditionally within the power of the courts in the English and American judicial systems.'" *Glidden Co. v. Zdanok*, 370 U.S. 530, 563 (1962).

Although the Attorney General in England could bring suits to "restrain breaches of statutory duty and excess of powers conferred by statute," such suits were generally confined to local authorities; he could not obtain an injunction "against the Crown or a Crown servant acting in that behalf." DE SMITH, *JUDICIAL REVIEW OF OFFICIAL ACTION* 344 (1959). The latter bar flowed from sovereign immunity, *cf.* WADE 14, rather than absence of a "controversy." A "local authority" in the English unitary, as opposed to our dual federal-state, system is a part of the one government, *cf. id.* at 22; and thus English law early provided for adjudicating disputes between one part of the government and another. The place of an injunction against the Crown and its servants is taken by a "declaration," *i.e.*, declaratory judgment, and a litigant can "be sure that it will be respected by the government." *Id.* at 226. See *id.* 87, 92-93. Crown immunity, as we have noted, has little relevance in this respect to the development of our institutions; Marshall maintained from the outset that "heads of departments" were "amenable to the laws." *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 164 (1803).

⁶⁶² *Goddard v. Smithett*, 69 Mass. (3 Gray) 116, 125 (1854); *Attorney General v. Trustees of Boston Elevated Ry.*, 319 Mass. 642, 652, 67 N.E.2d 676, 685 (1946): "The Attorney General represents the public interest, and as an incident to his office he has the power to proceed against public officers to require them to perform the duties that they owe to the public in general, and to have set aside such action as shall be determined to be in excess of their authority, and to have them com-

Frank remarked, Congress "can constitutionally authorize . . . the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists . . ."⁶⁰³ Again, the power to punish "delinquency of officers" is taken for granted,⁶⁰⁴ and a criminal prosecution under such a statute would unquestionably constitute a "case."⁶⁰⁵ A criminal prosecution against a delinquent official, and an injunctive suit by the Attorney General to halt illegal conduct are but varying means of achieving the same objective: compliance with law.⁶⁰⁶ Congress no less than the Attorney General may insist on executive compliance with law. Finally, it needs to be remembered that "an action against a recalcitrant official to force him to perform a statutory duty . . . is not [by a convenient fiction] a suit against the government"⁶⁰⁷ but a suit against a wrongdoer in his "individual" capacity. Were Congress to charge that an official is wrongfully withholding information to which it is constitutionally entitled, the official can be viewed as a wrongdoer who is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."⁶⁰⁸ A suit between such an "individual" and an adversary officer should plainly present a "case or controversy."

B. *Standing to Sue*

When we turn from "case or controversy" to "standing to sue" the scene shifts from a constitutional imperative to a judge-made rule unmentioned either in the common law or in the Constitution and which, in its present sophisticated form, is of relatively recent origin.⁶⁰⁹ The Supreme Court, however, has said that "the requirement of standing is often used to describe the constitutional limita-

pelled to execute their authority in accordance with law." See also *McMullen v. Person*, 102 Mich. 608 (1894); *State v. Robinson*, 112 N.W. 269, 272 (Minn. 1907); *State v. Cunningham*, 81 Wisc. 440, 51 N.W. 724 (1892). In the federal domain, the Attorney General may bring suit "by virtue of his office." *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 280, 284 (1888); *Sanitary District v. United States*, 266 U.S. 405, 426 (1925).

⁶⁰³ *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943). See *Reade v. Ewing*, 205 F.2d 630, 632 (2d Cir. 1953).

⁶⁰⁴ *Ex parte Siebold*, 100 U.S. 371, 387 (1879): "[If] Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers. . . ."

⁶⁰⁵ *ICC v. Brimson*, 154 U.S. 447, 486 (1894).

⁶⁰⁶ *Ibid.*

⁶⁰⁷ *Codray v. Brownell*, 207 F.2d 610, 613 (D.C. Cir. 1953).

⁶⁰⁸ *Ex parte Young*, 209 U.S. 123, 160 (1908). See note 326 *supra*.

⁶⁰⁹ *Jaffe* 1270, states that he encountered "no case before 1807 in which the standing of the plaintiff is mooted. . . ." And the standing of a private individual to enforce a "public right," he found, was first squarely presented in 1897. *Id.* at 1271-72.

tion on the jurisdiction of this Court to 'cases' and 'controversies',"⁶⁷⁰ and we have been told to look to the business of the "courts of Westminster when the Constitution was framed" in order to determine the scope both of "justiciable controversy" and "standing to sue."⁶⁷¹

So varied are the many meanings ascribed to "jurisdiction" that the addition of another should be avoided unless inescapable. Analytical precision can only be advanced when different concepts are expressed by different terms, when a double meaning is not ascribed to one word if it is capable of being shared by two.⁶⁷² Such truisms would scarcely bear repetition did they not serve to raise the question whether "justiciable controversy" and "standing to sue" are inextricably intertwined. I suggest that they are not, that they differ in origin, and meaningful consequences flow from the differentiation. It is simpler to confine constitutional "jurisdiction" to the power of a federal court to entertain a "case or controversy," reserving "standing" for the right of a litigant to invoke the court's aid, *i.e.*, his capacity to sue.⁶⁷³ Such a discrimination has already been made by the Supreme Court in *Tileston v. Ullman*:

Since the appeal must be dismissed on the ground that appellant has no standing to litigate the constitutional question . . . it is unnecessary to consider whether the record shows the existence of a genuine case or controversy essential to the exercise of the jurisdiction of this court.⁶⁷⁴

⁶⁷⁰ *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). A recent commentator states that "standing to sue is an element of the federal constitutional concept of 'case or controversy' . . ." WRIGHT 36. See also HART & WECHSLER 1425, index "Standing to Litigate" under "Cases and Controversies." See also *Pennsylvania R.R. v. Dillon*, 335 F.2d 292, 294 (D.C. Cir. 1964) ("Allegation of a legally protected right is a constitutional predicate of standing to attack government action.")

⁶⁷¹ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring). He regards "standing" as a "limitation 'on the judicial Power of the United States.'" *Ibid.*

⁶⁷² For example, if, as Mr. Justice Frankfurter states, "the simplest application of the concept of 'standing' is to situations in which there is no real controversy between the parties," *id.* at 151, why does it not suffice to say simply that there is no "case or controversy," without which the court has no power to entertain the cause.

⁶⁷³ In a searching analysis in another field, Professor Ehrenzweig likewise differentiates the jurisdiction of a court over the subject matter—the power confided by the state to decide in the premises, from the capacity of a party to sue. EHRENZWEIG, *CONFLICT OF LAWS*, 35, 71, 72, 120 (1962). Capacity to sue is of course multifarious. It was a threshold question in *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738, 823 (1824), where Marshall, C.J., first inquired "Is this legal entity a right to sue? Has it a right to come . . . into any court?"

⁶⁷⁴ 318 U.S. 44, 46 (1943). On the other hand, in *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289 (1928), there was "no lack of a substantial interest of the plaintiff in the question . . . [standing]." But Mr. Justice Brandeis concluded that "still the proceeding is not a case or controversy within the meaning of Article III. . . ."

That "case or controversy" and "standing to sue" are not interchangeable terms will emerge from examination of standing in two of its important aspects: whether a litigant has suffered an injury that amounts to a "legal wrong," and whether he is invoking a wrong done to another rather than his own. Of that aspect of standing which pertains to attempts to assert the right of another,⁶⁷⁵ the Supreme Court said in a constitutional context that judicial abstention rests not on "principles ordained by the Constitution" but rather on "rule[s] of practice," exceptions to which have been made "where there are weighty countervailing policies."⁶⁷⁶ The more vexing aspect of standing which is identified with the absence of legal injury (*damnum absque injuria*)⁶⁷⁷ corresponds to failure to state a cause of action. At common law a plaintiff might allege a real enough injury, presenting an actual dispute between adverse litigants—the core of "case or controversy"—and yet fail because his cause fell outside the existing writs.⁶⁷⁸ So, contracts under seal

⁶⁷⁵ 3 DAVIS 226-238.

⁶⁷⁶ *United States v. Raines*, 362 U.S. 17, 22 (1960). To the same effect, see Brandeis, J., quoted by Frankfurter, J., in *Poe v. Ullman*, 367 U.S. 497, 503 (1961).

⁶⁷⁷ In the classic federal example, *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939), 18 power companies sought to enjoin operations of the TVA, asserting a lack of constitutional power. The Court held that the plaintiffs lacked standing because the "damage consequent on competition, *otherwise lawful*, is in such circumstances *damnum absque injuria*. . . ." *Id.* at 140. (Emphasis added.)

Professor Davis' criticism seems to be unanswerable: "The plaintiffs were asserting that the competition was unlawful, and the Court was denying them an opportunity to show the unlawfulness. The question was not whether the plaintiffs had standing to challenge lawful competition, but whether they had standing to challenge competition, *the lawfulness of which was at issue*." 3 DAVIS 217. (Emphasis added.)

Professor Bickel justly remarked that "the question whether the Constitution protects against some forms of competition cannot be assumed away. . . ." Bickel 40. *Cf. Wright* 38.

The statement in *Pennsylvania R.R. v. Dillon*, 335 F.2d 292, 295 (D.C. Cir. 1964) that "mere economic competition made possible by governmental action (*even if allegedly illegal*) does not give standing to sue . . . *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 . . ." seems to me mistaken. *Tennessee* assumed that the competition was legal. How is one to prove an "allegation" of illegal competition if "standing" is to bar the way? That there is a right to protection from "unlawful" competition was reaffirmed in *Alabama Power Co. v. Ickes*, 302 U.S. 464, 484-85 (1938), which recognized the protection against "unlawful" competition afforded by *Frost v. Corporation Comm'n*, 278 U.S. 515, 521 (1929). Indeed, the District of Columbia court itself gave protection from "unlawful" competition in *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 323 F.2d 290, 298-99 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965).

Factually, the *Dillon* case turned on the court's refusal to read a statute which sought "to encourage resort to domestic shipyards" as exhibiting a Congressional intention "to insulate coastwise carriers from other domestic competition." *Id.* at 295. On this construction, the statute carved no exception from the norm—free competition, and such competition therefore invaded no "legal right."

⁶⁷⁸ Compare "When Congress transmutes a moral obligation into a legal one by specially consenting to suit, it authorizes the tribunal . . . to perform a

were enforced in actions of covenant from earliest times whereas a parol contract had to wait for enforcement until Slade's case adapted Assumpsit in 1603.⁶⁷⁰ Until 1603 there could be a real enough "controversy," an actual dispute between truly adverse parties arising out of an oral contract, and yet no remedy. It was this situation that was summed up in *damnum absque injuria*, an injury for which the law at the moment provided no remedy.

True, the courts of Westminster had no "jurisdiction" of a cause "save so far as by delegation from the King, that court was empowered to take cognizance of the *particular controversy*."⁶⁸⁰ But a "jurisdictional" limitation of this nature never found "any place in our system":

In England, the sovereign was the source of all authority, and the courts were his courts, and had no right to proceed in any cause without his authority and permission. It was the principal function of the original writ to give that permission. With us, on the contrary, the judicial power has always in fact been an independent coordinate branch of government. . . . It never required any special license or authority from any executive, by way of original writ or otherwise, to exercise its functions.⁶⁸¹

With us, in a word, failure to state a cause of action is not jurisdictional, it "calls for a judgment on the merits and not for a dismissal for want of jurisdiction."⁶⁸²

"Remedies" were not, of course, frozen by the Constitution to those extant in 1789. Marshall laid claim in *Marbury v. Madison* to the common law power to fashion a remedy for the protection of every right.⁶⁸³ Congress is not confined to traditional forms or remedies,⁶⁸⁴ and over the years it has conferred upon the courts an array of remedies unknown to the common law.⁶⁸⁵ It would

judicial function" within the meaning of Article III. *Glidden Co. v. Zdanok*, 370 U.S. 530, 567 (1962).

⁶⁷⁰ Berger, *From Hostage to Contract*, 35 ILL. L. REV. 281, 289 n.209 (1940). Ames 55-56; KEIGWIN 24.

⁶⁸⁰ KEIGWIN 11.

⁶⁸¹ *Parsons v. Hill*, 15 App. D.C. 532, 541 (1900). See also *Philadelphia B. & W. R.R. v. Gatta*, 27 Del. 38, 42-47, 85 Atl. 721, 724-25 (1913); KEIGWIN 11.

⁶⁸² *Bell v. Hood*, 327 U.S. 678, 682 (1946). See also *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359 (1959). Mr. Justice Frankfurter, dissenting in *Smith v. Sperling*, 354 U.S. 91, 98 (1957), objected that the Court was "confounding the requirements for establishing a substantive cause of action with the requirements of diversity jurisdiction." (stockholder's derivative action). In sum, "a court may have jurisdiction over the subject matter of an action though the complaint therein does not state a claim upon which relief can be granted." *Weiss v. Los Angeles Broadcasting Co.*, 163 F.2d 313, 314 (9th Cir. 1947).

⁶⁸³ 1 Cranch (5 U.S.) 137, 163 (1803).

⁶⁸⁴ *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937).

⁶⁸⁵ Compare such new remedies as the Federal Declaratory Judgment Act,

scarcely be urged that those who were given newly created legal rights have no standing because the courts of Westminster had not enforced such rights in 1789. To the contrary, the Supreme Court expressly recognized the right of Congress to confer standing upon one who could assert no "legal right" himself as representative of the public interest.⁶⁸⁶ "Case or controversy" has at times been applied in a Procrustean manner but at least in deference, mistaken or otherwise, to an express constitutional mandate. In the absence of express compulsion, that experience should make us wary of limiting "standing to sue" to the business of the "courts of Westminster when the Constitution was framed."⁶⁸⁷ In my view, "standing to sue" is not a constitutional limitation such as is "case or controversy"; it can be and has been enlarged beyond the 1789 boundaries. And with respect to such restrictions as "finality," "directness,"⁶⁸⁸ or "rights of another," they are judge-made rules of practice which the courts may modify as circumstances may require.

This is not meant to suggest that standing to attack official misconduct was narrowly confined at common law, for the contrary is the case. Professor Jaffe's valuable study of standing of *private*

and the Fair Labor Standards Act, which authorizes the Secretary of Labor to sue for recovery of minimum wages on behalf of an employee and to make a turn over of the recovery. Section 1b, 52 Stat. 1069 (1938), 29 U.S.C. § 216 (1959). One need only mention such "rights" as were created by the Federal Employers Liability Act.

⁶⁸⁶ *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470-77 (1940). See 3 DAVIS 220-22. Mr. Justice Frankfurter cites the *Sanders* case for the proposition that: "Adverse personal interest, even of such an indirect sort as arises from competition; is ordinarily sufficient to meet constitutional standards of justiciability. The courts may therefore by statute be given jurisdiction over claims based on such interests." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 151 (1951). For me the "constitutional standards of justiciability" are those of "case or controversy"; if those are satisfied there is no further constitutional "limitation" on creation of new remedies. The phrase "adverse personal interest" also is unduly restrictive; it would bar the suit by the Secretary of Labor to recover minimum wages on behalf of an employee, § 16, 52 Stat. 1069 (1938), 29 U.S.C. § 216 (1959), for the Secretary has no "personal" interest; nor have the various officials who have been permitted to sue to protect their "official functions" as distinguished from "personal interest." See text accompanying notes 701-04 *infra*.

My studies have led me to agree with Professor Davis: "The federal courts cannot justify their law of standing by saying that the 'case' or 'controversy' requirement of Article III of the Constitution requires the artificiality and the complexity. Nothing in the Constitution—except what the Supreme Court has put there—requires a departure from the simple and natural proposition that one who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable." 3 DAVIS 292.

⁶⁸⁷ In meeting the objection that the Constitution did not establish the common law, Governor Randolph told the Virginia Ratification Convention that "the wisdom of the Convention is displayed by its omission, because the common law ought not to be immutably fixed. . . . Its defective parts may be altered . . . and modified as the convenience of the public may require it." 3 ELLIOT'S DEBATES 469-70 (1941). For a similar remark by Nicholas, see *id.* at 451.

⁶⁸⁸ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 153-56 (1951) (Frankfurter, J., concurring).

individuals to attack official misconduct in "public actions" is instructive.⁶⁸⁰ From an early date the English courts took cognizance of actions by "strangers" to "prevent a usurpation of jurisdiction"; these were "public actions manifesting the King's concern that the officer not exceed his powers." True, the stranger often had some "special interest" which was "something less precise than a 'right'";⁶⁸⁰ but the interest of an agency, an official, or Congress in the protection of their functions from impairment equally amounts to such an interest, as was most recently confirmed by *United States ex rel. Chapman v. IPC*.⁶⁸¹ English law proceeded beyond the "special interest" of the stranger in the statutes authorizing informer's actions:

Statutes providing for actions by a common informer, who himself *has no interest whatever* in the controversy other than that *given* by statute, have been in existence hundreds of years in England, and in this country ever since the foundation of our Government.⁶⁸²

Though the grant of a portion of the potential recovery gives the informer an "adverse" interest for "controversy" purposes, it is patently an interest contrived for law enforcement.⁶⁸³ Even that "personal" interest is lacking in the widely accepted suits by an Attorney General to keep an official within bounds. In our own time, private litigants who had suffered no "legal injury," were

⁶⁸⁰ See note 649 *supra*.

⁶⁸⁰ JAFFE & NATHANSON, *ADMINISTRATIVE LAW* 834 (2d ed. 1961). Speaking of English law prior to adoption of the Constitution, Professor Jaffe relates that: "A number of notable statements expressed the King's general concern for legality, and in the writ of prohibition, at least, there is overt authority for allowing anyone to initiate the proceedings. Though in most mandamus cases there probably was in fact special injury, there is little or no positive precedent requiring it, and in many cases the special injury would not satisfy a strict requirement of violation of a right." Jaffe 1308. He also states that lists of mandamus cases in the English digests "strongly suggest the possibility that the plaintiff in some of them was without a personal interest," *id.* at 1270, directing attention also to *People v. Collins*, 19 Wend. 56, 65 (N.Y. Sup. Ct. 1837), which "lists a few English cases in which the relator was a private person without specific interest." The "relator action" derived from the Crown's duty "to see that public bodies keep within their lawful powers," WADE 95; and implicit in the English cases is recognition that a citizen who complained of a lawbreaking official presented a justiciable question. The more restrictive view expressed in *Frothingham v. Mellon*, 262 U.S. 447 (1923), has justly been criticized. 3 DAVIS 243-48; Jaffe 1266.

⁶⁸¹ 345 U.S. 153, 156 (1953). The official interest which gives standing to sue is hereinafter discussed in detail.

⁶⁸² *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) (quoting from *Marvin v. Trout*, 199 U.S. 212, 225 (1905)). Informer suits have been termed "one manifestation" of the basic idea of the private Attorney General who can sue to vindicate the public interest. DAVIS, *ADMINISTRATIVE LAW: CASES-TEXT-PROBLEMS* 420 (1960).

⁶⁸³ Compare the conduit function of the Secretary of Labor under the Fair Labor Standards Act § 14, 63 Stat. 919 (1949), 29 U.S.C. § 216(c) (1959), which authorizes him to sue on behalf of an employee for recovery of unpaid minimum wages and to turn over the recovery.

given standing by Congress to protest against improper administrative activity "as representatives of public interest,"⁶⁰⁴ a variant of the centuries-old "informer's" actions or the suits by the Attorney General "on the relation of" a private individual.⁶⁰⁵ The fact that the "public action" has become "broadly established in this country," that it is "deeply imbedded in our system,"⁶⁰⁶ testifies to widespread judicial recognition of our overriding concern that administrators be kept within bounds and that attainment of that goal can be facilitated by enlistment of "natural law enforcers."⁶⁰⁷

The case for a suit by Congress against the executive branch is not dependent upon such general propositions because the Supreme Court has given explicit recognition to the standing of a public official to challenge administrative action. In *United States ex rel. Chapman v. FPC*,⁶⁰⁸ the Secretary of the Interior was allowed to attack an order of the FPC, granting a license to a private power company to construct a dam, on the ground that it encroached on a responsibility that a statute had confided to him, namely, the duty of marketing surplus power developed at federal hydroelectric plants. Because an association of non-profit rural electric cooperatives had joined in the Secretary's challenge, the Court stated that "differences of view . . . preclude a single opinion of the Court *as to both* petitioners."⁶⁰⁹ Whatever "uncertainty" there may be as to "the meaning of the case,"⁷⁰⁰ recognition of the "interest" of a public official in protection of his functions from impairment represented no innovation.

The agency which protests that another administrator is unlawfully encroaching on *its* jurisdiction has an immediate interest that transcends an interest in general law enforcement—it seeks protection from impairment of its functions. The Supreme Court has recognized "the legitimate interest of public officials and administrative commissions, federal and state, to resist the endeavor

⁶⁰⁴ See note 686 *supra*.

⁶⁰⁵ Cf. *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

⁶⁰⁶ Jaffe 1275, 1296. Compare the treble damage suits authorized by the anti-trust laws, which are considered as a greater deterrent to dubious practices than possible criminal prosecution. MacIntyre 128. Attorney General Loevinger stated that: "It seems indisputable that law enforcement through private action is both more flexible and less authoritarian than enforcement by a central government agency." Loevinger 168. If this be true in the face of numerous official suits against anti-trust violators, how much more true must it be given the rarity with which the Attorney General sues to keep an official within bounds.

⁶⁰⁷ 3 DAVIS 220.

⁶⁰⁸ 345 U.S. 153 (1953). The facts are set out in more detail in *United States ex rel. Chapman v. FPC*, 191 F.2d 796 (4th Cir. 1951).

⁶⁰⁹ 345 U.S. at 156. (Emphasis added.)

⁷⁰⁰ 3 DAVIS 280.

to prevent the enforcement of statutes in relation to which they have official duties."⁷⁰¹ An agency which has a "duty" to perform has a "correlative right . . . to protection in performance of its function."⁷⁰² Needless to say, the standing of the state or federal government or of their officers has for long not been limited to pecuniary or proprietary interests.⁷⁰³ The right of Congress to protect one of its most vital functions from impairment rises at least as high as the standing of state senators to maintain the "effectiveness of their votes."⁷⁰⁴ The functions confided to Congress are more basic and essential and more deserving of protection from impairment than those of any agency or officer, and no instrumentality of government is more justified in challenging official misconduct than is the representative body elected by the people. Doubts, if any, which remain on the score of standing may be set at rest by a statute, earlier suggested,⁷⁰⁵ that would authorize the courts to entertain suits by Congress or a duly authorized committee against the executive branch and vice versa, to compel the delivery or protect the withholding of information:

Where suit by the United States [or one of its branches] is expressly authorized by Act of Congress, there is no problem of standing; Congress has power to authorize the United States to be guardian of the public interest by bringing suits.⁷⁰⁶

⁷⁰¹ *Coleman v. Miller*, 307 U.S. 433, 442 (1939). "Innumerable cases recognize the standing of an administrative or executive officer to defend the constitutionality of the legislation which he is charged with administering or enforcing." *HART & WECHSLER* 162.

⁷⁰² *Brewer v. Hoxie School Dist. No. 46*, 238 F.2d 91, 104 (8th Cir. 1956). In *Summerfield v. CAB*, 207 F.2d 200, 203 (D.C. Cir. 1953), wherein the board fixed air mail transportation rates for Western Air Lines, it was held that: "The Postmaster General is a party in interest by reason of the duties in respect to mail pay imposed upon him by the statute."

⁷⁰³ *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 447 (1945); *Sanitary Dist. v. United States*, 266 U.S. 405, 425 (1925) (standing to "remove obstruction to interstate and foreign commerce"); *Pennsylvania v. West Virginia*, 262 U.S. 553, 591-92 (1923) (suit to enjoin cut-off of gas); *New York v. New Jersey & Passaic Valley Sewage Comm'rs*, 256 U.S. 296, 308 (1921) (suit to enjoin discharge of sewage).

Non-pecuniary interests of administrative agencies have likewise been recognized, e.g., "state commissions . . . officially represent the interest of their states in obtaining adequate transportation service." *ICC v. Oregon-Washington R.R. & Nav. Co.*, 288 U.S. 14, 25 (1933). And state officials protecting their functions have an "adequate interest" even though they have sustained no "private damage." *Coleman v. Miller*, 307 U.S. 433, 442, 445 (1939). See also *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 460 (1940); *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 339 (1935); *Brewer v. Hoxie School Dist. No. 46*, 238 F.2d 91, 104 (8th Cir. 1956) (school board has "right to . . . protection in the performance of its functions"); *Board of Governors of Federal Reserve System v. Transamerica Corp.*, 184 F.2d 311, 316 (9th Cir. 1950); *WRIGHT* 60.

⁷⁰⁴ *Coleman v. Miller*, 307 U.S. 433, 438 (1939), quoted in *Baker v. Carr*, 369 U.S. 186, 208 (1962).

⁷⁰⁵ See text accompanying notes 630-34 *supra*.

⁷⁰⁶ *WRIGHT* 60. Mr. Justice Douglas said that Congress "has broad authority to

C. Political Questions

No mention is made of "political questions" in the debates of the Framers and the ratifying conventions as a limitation on the scope of judicial review. In at least one pre-1787 case, *Commonwealth v. Caton*,⁷⁰⁷ Judge George Wythe took for granted the justiciability of a dispute between the Virginia Senate and House of Delegates. That dispute lay at the bottom of an appeal from a conviction for treason; and Wythe unhesitatingly assimilated the duty "to protect one branch of the legislature, and, consequently the whole community, against the usurpations of the others," to the judicial duty to protect "a solitary individual against the rapacity of a sovereign." It speaks volumes on whether a dispute between different branches of government was deemed justiciable in 1782 that so eminent a jurist and scholar as George Wythe should not have experienced the slightest apprehension on that score. The "political questions" doctrine is a judicial construct of a later time, largely erected on the postulate that the power to decide in the premises has been confided to the other departments, a postulate that ill-fits the situation in which neither of the disputants can have the final say in the resolution of their boundary dispute.

Nevertheless, it has been generally assumed, among others by the revered Judge Learned Hand, that the courts will not adjudicate conflicting claims to power of the legislative and executive branches because they present a "political" and therefore non-justiciable question.⁷⁰⁸ That assumption needs to be tested by the cases, particularly since *Baker v. Carr*⁷⁰⁹—the explosive reapportionment case—has narrowed the realm of nonjusticiability.⁷¹⁰ No case thus far

determine who has standing to protest the action of administrative agencies." Douglas 225.

⁷⁰⁷ *Commonwealth v. Caton*, 4 Call 5, 8 (Va. 1782).

⁷⁰⁸ BARTH 17; TAYLOR 87; KRAMER & MARCUSE 903, citing still other writers; YOUNGER 776. Cf. SCHWARTZ 45; HAND 18: "[W]ould you not, like me, guess that the Court would refuse to pass on the controversy?" I have some difficulty squaring this with his prior statement, *id.* at 3, that: "No provision was expressly made, however, as to how a 'Department' was to proceed when in the exercise of one of its own powers it became necessary to consider the validity of some earlier act of another 'Department.' Should the second accept the decision of the first that the act was within the first's authority, or should it decide the question *de novo* according to its own judgment? A third view prevailed, as you all know: that it was a function of the courts to decide which 'Department' was right, and that all were bound to accept the decision of the Supreme Court." One who finds himself differing with Judge Hand must say, as did Justice Iredell long ago, that "however painful it may be, to differ from gentlemen, whose [vastly] superior abilities and learnings I readily acknowledge, I am under the indispensable necessity of judging according to the best lights of my own understanding, assisted by all the information I can acquire." *Ware v. Hylton*, 3 Dall. (3 U.S.) 199, 265 (1796).

⁷⁰⁹ 369 U.S. 186 (1962).

⁷¹⁰ Emerson 66, citing, *inter alia*, the Court's rejection of blanket application of the doctrine even to foreign relations and to Indians. 369 U.S. at 211, 215.

has decided that a legislative-executive conflict is nonjusticiable. On the contrary, the Supreme Court has already acted "as umpire between Congress and the [P]resident"⁷¹¹ in *Myers v. United States*⁷¹² and *United States v. Lovett*.⁷¹³ In *Myers* the Court permitted the Attorney General to attack a congressionally enacted statute limiting the President's removal power, and as Mr. Justice Frankfurter later remarked, "on the Court's special invitation Senator George Wharton Pepper, of Pennsylvania, presented the position of Congress [in opposition to the Attorney General] at the bar of this Court."⁷¹⁴ In *United States v. Lovett*, involving a statute designed to force certain agencies to discharge respondents, the argument of counsel for Congress⁷¹⁵ that

since Congress under the Constitution has complete control over appropriations a challenge to the measure's constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress has final say

was rejected.⁷¹⁶ In form, to be sure, both *Myers* and *Lovett* were private suits for recovery of salary, but in substance—Mr. Justice Frankfurter has reminded us of the Court's admonition to avoid the "tyranny of labels"⁷¹⁷—these were in fact vigorous contests between Congress and the President.⁷¹⁸ And in the teeth of a congressional attempt to deprive the Supreme Court of jurisdiction to review a provision curtailing the effect of a Presidential pardon, the Court held in *United States v. Klein* the provision "impairs the executive authority,"⁷¹⁹ thus jumping into a "political thicket" with both feet. If the central "power" issue was "political," the curse was not removed because it was presented in a "private" litigation.

⁷¹¹ Nathanson 332. In the 1789 Congressional debate on the President's removal power, Elbridge Gerry, one of the Framers, had said that the "Judges are the Constitutional umpires on such questions." Quoted, WARREN 162. For similar remarks by William Smith, "a broad Federalist," and Alexander White, "a strict constructionist," see *id.* at 101-02.

⁷¹² 272 U.S. 52 (1926).

⁷¹³ 328 U.S. 303, 312 (1946).

⁷¹⁴ *Wiener v. United States*, 357 U.S. 349, 353 (1958).

⁷¹⁵ 328 U.S. at 304.

⁷¹⁶ *Id.* at 313, 314. Nathanson 337, says *United States v. Lovett* "in one sense . . . was a protection of the executive power over personnel against unwarranted intrusions by Congress." See 328 U.S. at 312. The Court found no "need" to decide whether the statute was "an unconstitutional encroachment on executive power. . . ." *Id.* at 307.

⁷¹⁷ *Baker v. Carr*, 369 U.S. 186, 297 (1962). Compare *United States v. ICC*, 337 U.S. 426, 430 (1949); *Columbia Broadcasting Sys. v. United States*, 316 U.S. 407, 415 (1942).

⁷¹⁸ Citing *Myers v. United States*, a privilege proponent, Younger 777 n.100, states that "we should not forget that the Supreme Court has decided disputes between Congress and the President under its general power to hold the other two departments within the ambit of the Constitution."

⁷¹⁹ 13 Wall. (80 U.S.) 128, 145, 148 (1871).

But even that "private" element is missing in cases such as *FPC v. United States*, wherein an executive department and an independent agency are frequently lined up on opposing sides⁷²⁰ and in which not the slightest notice is taken of "political questions." The Supreme Court has expressly declined to apply the doctrine to boundary disputes, which are the quintessence of "sovereignty," between two states⁷²¹ and between the United States and a state.⁷²² What, one asks, is the element that transforms a dispute between those lesser entities of government, the legislature and executive, into a "political question"? Public law teems with cases holding that an official has exceeded his authority, and it is difficult to perceive why that issue becomes "political" when Congress rather than a private litigant or an Attorney General asserts that an officer is disobeying its duly enacted statute or is wrongfully impairing a function conferred upon it by the Constitution. Certainly no ready answer is furnished by the cases. Although it is tempting to examine fresh attempts to categorize "political questions" and to rationalize them anew,⁷²³ it must here suffice to discuss the immediate problem in the framework of familiar generalizations, noting in passing that an attempt to root the doctrine in pre-constitutional sources is not securely based.⁷²⁴ Since *Baker v. Carr* does not explore the implica-

⁷²⁰ See note 635 *supra*.

⁷²¹ *Virginia v. West Virginia*, 11 Wall. (78 U.S.) 39, 55 (1870). *Cf.* *Florida v. Georgia*, 17 How. (58 U.S.) 478 (1854). See also note 703 *supra*. Such cases may be considered as presenting "purely political questions." WARREN 40. See *id.* at 54.

⁷²² *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Texas*, 143 U.S. 621 (1892).

⁷²³ See Frank, *Political Questions*, in *SUPREME COURT AND SUPREME LAW* 36 (1954); Bickel 74-79; Jaffe 1302-07. For earlier studies see citations, HART & WECHSLER 192.

⁷²⁴ Mr. Justice Frankfurter, dissenting in *Baker v. Carr*, 369 U.S. at 288-89 n.21, stated that: "The reluctance of the English Judges to involve themselves in contests of factional political power is of ancient standing," citing *The Duke of York's Claim to the Crown*, 5 Rotuli Parl. 375 (1460), printed in WAMBAUGH, *CASES IN CONSTITUTIONAL LAW* 1 (1915). There Prince Richard, Duke of York, laid claim before the House of Lords to the Crowns of England and France. This was an episode in the fratricidal strife between the Houses of York and Lancaster which David Hume characterized as a "scene of extraordinary cruelty and fierceness." 2 HUME, *HISTORY OF ENGLAND* 19 (1810). At this moment the gentle Henry VI was imprisoned and the "parliament was surrounded by (Richard's) victorious army." *Id.* at 23-25. The House turned to the King's Justices for advice, giving them the King's "commandment" to oppose the claim. The Justices begged off for several reasons, among them that "the matter was so high, and touched the King's high estate and regalie, which is above the law and passed their lernyng." *Id.* at 2-3. Can the "reluctance" of Judges to take sides in a bloody civil war at the risk of their necks be compared to the task of determining reapportionment in the United States today? Even 150 years later, Lord Coke, a brave enough man, yielded in the face of James I's wrath: "Very likely [he] did fall on his face. It was that or a cell in the Tower." BOWEN 306, 388-90.

Mr. Justice Frankfurter also remarks, 369 U.S. at 288 n.21: "Considerations similar to those which determined the Cherokee Nation Case and *Georgia v. Stanton* no doubt explain the celebrated decision in *Nabob of the Carnatic v. East India Co.*,

tions of the prior cases "in other contexts" a quick review is essential if their impact upon the executive privilege controversy is to be weighed.⁷²⁵ Roughly speaking three major criteria have emerged: (1) power to determine has been lodged elsewhere than in the courts; (2) no available standards for determination are at hand; and (3) enforcement or fashioning of a remedy is surrounded with difficulties.

1. Jurisdiction is Not Lodged Elsewhere

Baker v. Carr sums up the matter thus: "The nonjusticiability of a political question is primarily a function of the separation of powers."⁷²⁶ In an earlier phrasing, the test is whether "a dispute has been withdrawn from the judiciary or . . . by the charter of our government has been reposed in departments other than the judiciary."⁷²⁷ Some constitutional grants are clearer than others, for example the power expressly given Congress to pass upon the "qualifications of its own members."⁷²⁸ Elsewhere exigencies of government have led the Court to find implicit lodgment of power in other branches, such as the determination of "when or whether a war has ended" because of the "need for finality,"⁷²⁹ or because

1 Ves. jun.* 371; 2 Ves. jun.* 56 [1791 and 1793], rather than any attribution of a portion of British sovereignty, in respect of Indian affairs, to the company." Arguing for the plea to the Nabob's bill, the Attorney General had said: "The question intended to be submitted to the Court is, whether both parties being sovereign independent powers their contests can be made the subject . . . for the municipal jurisdiction of any Court in the country of either of the contracting parties." 1 Ves. jun. at 372. The plea was overruled for inadequacy in certain particulars; an answer "containing the same matter of defense that had formed the subject of the plea" was interposed, 2 Ves. jun. at 55, and the High Court of Chancery said: "That treaty was entered into . . . as . . . a treaty between two sovereigns; and consequently is not a subject of private, municipal, jurisdiction." *Id.* at 60.

Disputes "between independent nations" have been distinguished from those between the United States and a state or between two states to which the judicial power expressly extends. *United States v. Texas*, 143 U.S. 621, 639 (1892). Neither the United States nor a foreign nation will admit that its rights under an agreement "can be ultimately determined by a foreign local court without the consent of each party to the agreement." 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 167-68 (1943). The *Cherokee Nation* case was put in the "independent nation" category with the explanation that there the duty of the Court was not "to lead, but to follow the action of the other departments. . . ." *United States v. Texas*, 143 U.S. 621, 639 (1892).

It is worth noting that in *Carnatic*, Lord Chancellor Thurlow dismissed out of hand the "argument of inconvenience and the difficulty of making a decree," 1 Ves. jun. 371, 391 (1791).

⁷²⁵ 369 U.S. at 210.

⁷²⁶ *Ibid.*

⁷²⁷ *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 446 (1945); *Wechsler* 9. See also *Mr. Justice Douglas concurring in Baker v. Carr*, 369 U.S. at 246.

⁷²⁸ U.S. CONST. art. I, § 5(1).

⁷²⁹ 369 U.S. at 213; *Coleman v. Miller*, 307 U.S. 433, 454 (1939).

some questions "uniquely demand single-voiced statement of the Government's views."⁷³⁰

Implicit "exclusive" legislative or executive jurisdiction is further illustrated by the guarantee of a "republican form of government" cases, *Luther v. Borden*⁷³¹ and *Georgia v. Stanton*.⁷³² *Luther v. Borden* arose out of the Dorr Rebellion in Rhode Island, and in the aftermath "two groups laid competing claims to recognition as the lawful government."⁷³³ The Court termed the question "political" for reasons recently summarized in *Baker v. Carr*:

[T]he commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive's decision; and the lack of criteria by which a court could determine which form of government was republican.⁷³⁴

In *Georgia v. Stanton*, the Court held that whether Congress may by the Reconstruction Acts "totally abolish the existing State government" of a defeated Confederate state and supplant it by military occupation is a matter of "political jurisdiction."⁷³⁵ The necessity that those who declare and conduct a war should determine what measures are required after victory to accomplish the results for which the war was fought seems almost self-evident, particularly when Congress and the President concur.⁷³⁶ Occupation and pacification of hostile territory, even after a Civil War, is not a matter upon which "wrangling lawyers" can shed much light.⁷³⁷ Whether such cases and the "foreign relations" cases are explicable in terms of constitutional interpretation, *i.e.*, "a textually demonstrable constitutional commitment of the issue to a coordinate political department"⁷³⁸ or whether they turn on considerations that run be-

⁷³⁰ 369 U.S. at 211. Professor Jaffe concludes that: "The Constitution itself is construed to assign this jurisdiction" to recognize a foreign government. Jaffe 1302. Bickel 46, considers that the judicial process goes beyond "constitutional interpretation" to "something greatly more flexible, something of prudence, not construction and not principle."

⁷³¹ 7 How. (48 U.S.) 1 (1849).

⁷³² 6 Wall. (73 U.S.) 50 (1867). See 369 U.S. at 218-25.

⁷³³ *Id.* at 218.

⁷³⁴ *Id.* at 222.

⁷³⁵ 73 U.S. at 76-77.

⁷³⁶ "Congress having determined that the effects of the recent hostilities required extraordinary measures to restore governments of a republican form, this Court refused to interfere with Congress' action. . . ." 369 U.S. at 225.

⁷³⁷ *Cf.* Bickel 75. The critique of *Luther v. Borden* and *Georgia v. Stanton* by Mr. Justice Douglas, in *Baker v. Carr*, 369 U.S. 242-43 n.2, 246 n.3 (concurring opinion) needs to be taken into account.

⁷³⁸ 369 U.S. at 217.

yond "interpretation,"⁷³⁰ the end result is judicial abstention because the jurisdiction to decide is or should be lodged elsewhere.

The power finally to decide whether Congress has an absolute right to demand information or whether the executive has an absolute right to refuse it plainly was not lodged in either of those branches. Essentially this is a dispute about the scope of intersecting powers; if one branch has the claimed power the other branch necessarily has not. It seems axiomatic that one branch cannot finally decide the reach of its own power when the result is to curtail a power claimed by another. Madison said in *The Federalist* that neither of the departments "can pretend to an exclusive or superior right of settling the boundaries between their respective powers. . . ."⁷⁴⁰ Unless the two branches are to be remitted to the "trial of physical strength" which *United States v. Texas* decried,⁷⁴¹ the power to decide such disputes must reside in the courts. Even in the smoke and turmoil of *Luther v. Borden*, the Supreme Court was at pains to differentiate from the "political" dispute for power of competing state factions the

high power . . . of passing judgment upon the acts . . . of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of the power marked out for them respectively by the Constitution of the United States.⁷⁴²

"Some arbiter," said Mr. Justice Jackson, "is almost indispensable when power is . . . balanced between different branches, as the legis-

⁷³⁰ See Bickel 74-79.

⁷⁴⁰ THE FEDERALIST, No. 49, at 348 (Wright ed. 1961). True, Madison also said that no provision was made "for a particular authority to determine the limits of the constitutional division of power between the branches of the government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be determined in this way, there is no resource left but the will of the community. . . ." 1 ANNALS OF CONG. 520 (1789).

The view of Hamilton, THE FEDERALIST, No. 78, and Marshall, *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 176 (1803), that it was for the courts to declare constitutional limits is no less applicable because the limits are drawn between two branches. In Madison's own Virginia, Judge George Wythe, was prepared to draw those lines between the House of Delegates and Senate. See text accompanying note 707 *supra*.

And Madison by no means expressed a general viewpoint. In the same debate in the First Congress on the President's removal power, Elbridge Gerry, also a member of the Constitutional Convention, said that if the President and the Senate differ, "let it go before the proper tribunal; the judges are the constitutional umpires on such questions." 1 ANNALS OF CONG. 492 (1789). To the same effect is Congressman Plater in 1802. 11 ANNALS OF CONG. 935 (1802). And so in the event it transpired. See text accompanying notes 711-14 *supra*. See also note 40 *supra*.

In the "Steel Seizure" case, Mr. Justice Burton said: "[T]he President's order . . . invaded the jurisdiction of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660 (1952) (concurring opinion).

⁷⁴¹ 143 U.S. 621, 641 (1892).

⁷⁴² 48 U.S. at 47.

lative and executive. . . . Each unit cannot be left to judge the limits of its own power."⁷⁴³ Were the "executive privilege" rights more clearly "political," the courts, said *Baker v. Carr*, "cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."⁷⁴⁴ For, said Chief Justice White in another "political question" case, it is the "ever present duty" of the courts "to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power."⁷⁴⁵

2. Adequate Criteria for Determination Are Available

"The lack of criteria" for judicial determination, mentioned in *Luther v. Borden*, is another oft-mentioned test of "political question." There the Court dwelt on the practical and evidentiary difficulties of determining whether the Rhode Island constitution sponsored by the Dorr faction was adopted by "authorized" voters.⁷⁴⁶ Conversely, said *Baker v. Carr*, if "clearly definable criteria for decision may be available . . . the political question barriers falls away."⁷⁴⁷ Despite the "enormously difficult problem of working out standards for utilizing the equal protection provision in the apportionment cases," the majority in *Baker v. Carr* entered the field.⁷⁴⁸ In contrast, no new standards are required to be fashioned for dealing with the executive privilege controversy. For centuries Anglo-American Courts have dealt with diverse claims of privilege to withhold information,⁷⁴⁹ and in almost every category of claimed executive privilege to withhold information there exist judicial precedents formulated in private litigation. The task will not therefore require the formulation of new standards but rather adaptation and application of existing ones. Viewed in terms of fitness for judicial determination, the basic issues of fact and law are

⁷⁴³ JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 9 (1941). Compare *HAND supra* note 708.

⁷⁴⁴ 369 U.S. at 217. See *id.* at 230. Compare *United States v. Lovett*, 328 U.S. 303 (1946), discussed in text accompanying notes 713-16 *supra*.

⁷⁴⁵ *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 150 (1912).

Given a statute directing a department or an agency to furnish information to Congress, see text accompanying note 79 *supra*, determination whether an officer must comply with the statute cannot be a "political question"; for the power so to determine is necessarily confided to the courts.

⁷⁴⁶ 48 U.S. at 41-42. See also *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939).

⁷⁴⁷ 369 U.S. at 214.

⁷⁴⁸ Emerson 65. Mr. Justice Douglas justly remarks that: "Adjudication is often perplexing and complicated. An example of the extreme complexity of the task can be seen in a decree apportioning water among the several states." *Baker v. Carr*, 369 U.S. at 245 (concurring opinion).

⁷⁴⁹ See pp. 1293-1308 *supra*.

not significantly altered because it may be the Attorney General rather than his brother, Mally Daugherty, who is asked about misconduct in the Department of Justice. That which is "essentially a judicial question . . . in suits between private parties [or between them and the government] . . . is not different in a suit between States,"⁷⁶⁰ or between different branches of the same state. In fine, the courts can draw upon the precedents in private litigation for guide lines in almost every category of executive privilege.

3. There is No Special Difficulty in Shaping Relief

Another criterion of "political question," in the words of Mr. Justice Frankfurter, is the difficulty of "finding appropriate modes of relief."⁷⁶¹ A Court which did not boggle at the formidable remedial difficulties⁷⁶² posed by reapportionment⁷⁶³ should not shy from requiring an executive officer to deliver information or to declare that he is under no duty to do so. Compared with the complexities involved in reapportionment this is a marvelously simple judicial order, differing little from countless orders which direct public officers to do or refrain from doing something.

If the assertion of a right to obtain or to withhold information be deemed "political," that "does not mean it presents a political question."⁷⁶⁴ Judicial resolution of the executive privilege controversy will not "risk embarrassment of our government abroad, or grave disturbance at home."⁷⁶⁵ It will not embroil the Court in

⁷⁶⁰ *Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923).

⁷⁶¹ 369 U.S. at 278 (dissenting opinion). Cf. Jaffe 1306.

⁷⁶² Professor Bickel points out that "the decisive factor in *Colegrove* could not well have been the difficulty or uncertainty that might attend enforcement of a judicial decree. A judicial system that swallowed *Brown v. Board of Education* and *Cooper v. Aaron* would hardly strain at *Colegrove v. Green* or *Baker v. Carr*." Bickel, *The Durability of Colegrove v. Green*, 72 *YALE L.J.* 39, 40 (1962). The Court itself acknowledged in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), that "the formulation of decrees in these cases presents problems of considerable complexity."

⁷⁶³ Emerson 75-80. Cf. Sindler, *Baker v. Carr: How to "Sear the Conscience" of Legislators*, 72 *YALE L.J.* 23, 32-38 (1962).

⁷⁶⁴ 369 U.S. at 209; Jaffe 1304. "From the beginning, the Court had to resolve what were essentially political issues—the proper accommodation between the states and the central government." FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 318 (1927). It needs to be borne in mind that a "Constitution is a political instrument. It deals with government and governmental powers It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described" *Melbourne v. Commonwealth of Australia*, 74 *Commw. L.R.* 31, 82 (1947) (Dixon, J.). This had been anticipated by De Tocqueville: "The American judge is brought into the political arena independently of his own will. . . . The political question which he is called upon to resolve is connected with the interest of the suitors and he cannot refuse to decide it without abdicating the duties of his post." 1 *DE TOCQUEVILLE, DEMOCRACY IN AMERICA*, 101 (1900). See also note 1 *supra*.

⁷⁶⁵ 369 U.S. at 226.

the "over-whelmingly party or intra-party contests" such as Mr. Justice Frankfurter feared might flow from the reapportionment decision⁷⁶⁰ for, as the clinical examples earlier set out show, information withholdings seldom are "strongly entangled in popular feelings."⁷⁶⁷ When one compares the "violently partisan nature" of the reapportionment controversy,⁷⁶⁸ the "political" overtones of executive resistance to a congressional request for an Inspector General's report seem like flutterings over teacups.

In sum, the political question doctrine, in my opinion, interposes no obstacle to judicial determination of the rival legislative-executive claims to receive or withhold information. The power to decide these claims plainly has not been lodged in either the legislative or executive branch; equally plainly, the jurisdiction to demark constitutional boundaries between the rival claimants has been confided to the courts. The criteria for judging whether a claim of "executive privilege" is maintainable are a familiar staple of judicial business. And the framing of a remedy is attended by no special difficulty but rather falls into familiar patterns. Each of the parties seeks power allegedly conferred by the Constitution and each maintains that interference by the other with the claimed function will seriously impair it, the classic situation for judicial arbitrament.

Of those who assume that the executive privilege controversy poses a nonjusticiable political question, Kramer and Marcuse alone attempt to supply a footing, but in the form of citations rather than argument.⁷⁶⁹ First they cite *Massachusetts v. Mellon*.⁷⁶⁰ That case did not, of course, decide that a dispute between two entities of government is per se "political" as is immediately made plain by the row of adjudicated disputes between a state and the United States, between two states, and between a department and an independent agency.⁷⁶¹ It held, first, that "the United States, not the State, represents the citizens as *parens patriae* in their relations to the federal government,"⁷⁶² and second, that the state had no standing to challenge the constitutionality of federal grants which it could accept or reject and which therefore imposed no obligation.⁷⁶³ Because of the absence of injury, the Court declined "to

⁷⁶⁰ *Id.* at 324 (dissenting opinion).

⁷⁶⁷ *Id.* at 267.

⁷⁶⁸ Emerson 65.

⁷⁶⁹ Kramer & Marcuse 903.

⁷⁶⁰ 262 U.S. 447 (1923).

⁷⁶¹ See notes 703, 721 and 722 *supra*.

⁷⁶² *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 446 (1945).

⁷⁶³ 262 U.S. at 482. DAVIS, *ADMINISTRATIVE LAW* 682 (1951).

adjudicate . . . abstract questions of political power."⁷⁶⁴ Given real rather than abstract disputes between governmental instrumentalities, the Court, as the above-cited examples show, has not hesitated to decide them.

Next they cite *Muskrat v. United States*.⁷⁶⁶ It has been said that "its fundamental unsoundness in terms of present law is overwhelmingly clear";⁷⁶⁹ but in any event it turns on the alleged absence of truly adverse interests necessary to a "case or controversy" and makes no mention of "political questions." Again, that portion of *Marbury v. Madison*⁷⁶⁷ is cited which discusses whether Marbury had a remedy for the withholding of his signed commission, and in which the Court states that "in cases in which the executive possesses a constitutional or legal discretion"⁷⁶⁸ the acts of department heads "are only politically examinable." This leaves open the question whether the executive possesses "uncontrolled discretion" to withhold information from Congress. *Marbury* did not intimate that the executive branch can finally determine the scope or area of its own discretion. Only the choices within that area are not dictated by the courts; the "court decides in each case what the area of discretion is."⁷⁶⁹ Thus the Kramer and Marcuse citations fall far short of establishing the proposition that the executive privilege conflict constitutes a non-reviewable political question.⁷⁷⁰

⁷⁶⁴ 262 U.S. at 484-85.

⁷⁶⁵ 219 U.S. 346 (1911).

⁷⁶⁶ 3 DAVIS 119.

⁷⁶⁷ 1 Cranch (5 U.S.) 137 (1803). This was a suit by a District of Columbia Justice of Peace against the Secretary of State for delivery of his commission, and the Court decided that Congress cannot enlarge the original jurisdiction of the Court. So Marshall explained in *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264, 398 (1821). Why cannot the Court, therefore, in a suit by Congress against an executive officer, determine that the officer may not curtail the jurisdiction of Congress, equally a problem of demarking constitutional boundaries?

⁷⁶⁸ *Id.* at 166. (Emphasis added.)

⁷⁶⁹ JAFFE & NATHANSON, ADMINISTRATIVE LAW: CASES & MATERIALS 791 (1961). Cf. *Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946) ("an agency may not finally decide the limits of its statutory powers.")

⁷⁷⁰ Kramer & Marcuse 903 n.791, also cite *Craig v. Leitensdorfer*, 123 U.S. 189 (1887), which seems irrelevant. *Leitensdorfer* filed a bill to enjoin an officer from delivering a plat to Craig. The Court said that a decree would be "entirely inefficacious" because "if the acts complained of are . . . void as being without authority of law, then they can have no legal effect whatever, and cannot be set up by the officers of the Department . . . as reasons for refusing to entertain and determine the appeals of *Leitensdorfer*. . . . The proper remedy is by a writ of mandamus, and not by a bill in equity." *Id.* at 214.

Another Kramer and Marcuse citation is *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264 (1821), an information for selling lottery tickets in violation of state law. The Court held that it had appellate jurisdiction when a state statute was allegedly repugnant to the Constitution notwithstanding one of the parties was a state and the other a citizen of that state. At page 405, the Court rejected the argument that there

The contrary of that proposition flows from their recognition of the fact that:

A case or controversy could arise if Congress cited for contempt, pursuant to 2 U.S.C. § 194, a Government official who had refused to comply with a demand for information and criminal proceedings were thereupon instituted, or if Congress exercised its own contempt powers and directly ordered the arrest of the official without invoking the assistance of the courts, and the prisoner sought relief by way of habeas corpus.⁷⁷¹

In short, say Kramer and Marcuse, the courts can entertain a conflict between Congress and the executive in a criminal or habeas corpus proceeding. But since the *subject* of such suits, *ex hypothesi*, remains a "political question," justiciability cannot be made to turn on the accident of remedy. If conflicting claims to power between Congress and the executive branch present a "political question," a shift in *procedure*—from an injunction to a habeas corpus for illegal imprisonment—cannot transform the *subject matter*,⁷⁷² that remains "political." And an injunction against a wrongdoing officer in his individual capacity would no less involve an "individual" than would the habeas corpus proceeding. To conclude alternatively that such controversies are nonjusticiable in any type of proceeding would be to permit Congress to imprison executive officers without hindrance,⁷⁷³ unless the issue is to be left to a "trial of physical strength," a solution already rejected.⁷⁷⁴

There remains the recurring suggestion that the controversy should be resolved at the polls.⁷⁷⁵ It is unrealistic to assume, however,

can be "a case in law or equity" arising under the Constitution, to which the judicial power does not extend. The relevance of this to "political questions" is obscure.

Kramer and Marcuse also cite *Osborn v. U.S. Bank*, 9 Wheat. (22 U.S.) 738 (1824), where the issue was the "right of the Bank to sue in the Courts of the United States," *id.* at 816, and where the Court stated that the judicial power is "capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case. . . . The suit of the Bank of the United States v. Osborn . . . is a case." *Id.* at 819.

For the argument that a suit by Congress against an executive officer alleging failure to comply with a statute or failure to furnish information would also be a "case," see note 643-59 *supra*.

⁷⁷¹ Kramer & Marcuse 903. Professor Bishop, as Kramer and Marcuse remark, is also of this view. Bishop 484-85.

⁷⁷² Compare *ICC v. Brimson*, 154 U.S. 447, 486 (1894): "We cannot assent to any view of the Constitution that concedes the power of Congress to accomplish a named result, indirectly by particular forms of judicial procedure, but denies its power to accomplish the same result, directly, and by a different proceeding judicial in form."

⁷⁷³ The courts "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." 369 U.S. at 217.

⁷⁷⁴ *United States v. Texas*, 143 U.S. 621, 641 (1892).

⁷⁷⁵ Kramer & Marcuse 626; Younger 784. Cf. TAYLOR 87.

that refusals to furnish investigatory reports respecting such matters as foreign aid to Pakistan or Laos or Viet Nam can be blown up to campaign proportions. Often they are stale by the time a national campaign is waged, and in any event they must be lost in the swirling clash of larger issues. Withholding issues are unlikely to arouse sufficient popular interest to affect the course of a campaign. There is, moreover, a "strong American bias in favor of judicial determination of constitutional and legal issues."⁷⁷⁶ From the beginning it was contemplated, in Madison's words, that the courts would be "an impenetrable bulwark against every assumption of power in the Legislative or Executive."⁷⁷⁷ It would be passing strange to conclude that a citizen may seek the protection of that bulwark against a \$20 fine⁷⁷⁸ but that it is unavailable to protect a branch of the government from impairment of a process essential to our democratic system. The President no less than Congress must be protected against such impairment, as, for example, when he complains that a statute enacted by Congress over his veto unconstitutionally cuts down the executive power.

X. CONCLUSION

Congressional investigation is "the surest guard . . . against corruption and bureaucratic waste, inefficiency and rigidity,"⁷⁷⁹ and the need for the unclogged exercise of that function greatly outweighs the benefits that may be deemed to flow from executive withholding. The practices of the Eisenhower Administration illustrate that the greater part of such withholding serves no crucial administrative needs, as is confirmed by the fact that the executive branch has survived President Kennedy's drastic amputation of withholding without noticeable ill effect. Although President Johnson has followed in his footsteps⁷⁸⁰ it may be doubted in light of the past, whether future successors who lack their legislative experience will follow suit. Recurrent strife is to be expected, accompanied by interminable bickering over the right to information that is for the most part innocuous. When weighed in terms of serious needs of government this is a luxury that we can no longer afford. Both Congress and the executive branch are constantly confronted by aching, undreamed of exigencies that explode in every corner of the globe and

⁷⁷⁶ Jaffe 1302. See also 3 DAVIS 348.

⁷⁷⁷ Quoted in TAYLOR 137.

⁷⁷⁸ *Frank v. Maryland*, 359 U.S. 360 (1959).

⁷⁷⁹ Wyzanski 103. The Supreme Court has adverted to the "danger to effective and honest conduct of the Government if the legislature's power to probe corruption in the executive branch were unduly hampered." *Watkins v. United States*, 354 U.S. 178, 194-95 (1957).

⁷⁸⁰ See note 548 *supra*.

the energies of both branches would be better spent on consideration of problems that cry out on every hand for solution.

Although I consider that history, the normal index of constitutional construction, strongly indicates that the argument for unlimited congressional power to require information from the executive branch is much more solidly based than the executive claim of absolute power to withhold, and that that claim is little advanced by the practical considerations adduced on its behalf, I do not suggest that absolute discretion to demand information should be substituted for unlimited power to withhold it. All "unlimited power" is inherently dangerous. Already the Supreme Court has remarked that "far-reaching" as is the congressional power of inquiry, it does not embrace matters which are within the "exclusive province" of the executive branch."⁷⁸¹ Who is to determine the limits of that "exclusive province"? Presently the executive branch is in the driver's seat if only because effective congressional retaliation is too clumsy and injurious to the national welfare. Neither the Congress nor the nation can be content to have the executive branch finally draw constitutional boundaries when the consequence is seriously to impair a legislative function that is so vital to the democratic process. No more may Congress decide the scope of executive power. Neither branch, in Madison's words, has the "superior right of settling the boundaries between their respective powers."⁷⁸² That power was

⁷⁸¹ *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959).

⁷⁸² *THE FEDERALIST*, No. 49. Madison sets forth Jefferson's reasoning saying that it has "great force." A statement Madison made in the First Congress during the debate on the President's "removal" power may be thought to contradict the "boundary" statement: "There is not one Government . . . in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the Government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be determined in this way, there is no resource left but the will of the community, to be collected in some mode to be provided by the Constitution. . . ." 1 *ANNALS OF CONG.* 520 (1789-1791). At issue was the power of the House to "grant" to the President a "removal" power, *id.* at 385, and Madison himself concluded that the House was "not in possession of this power," and that "the Constitution fairly vests the President with the power," *id.* at 605, so in fact Madison was asking the House to construe favorably a power of another branch, a situation that had no bearing on a "boundary" dispute. He himself gave the best possible refutation of the practicability of seeking the "will of the community" in such disputes. See *THE FEDERALIST*, Nos. 49 and 50. In any event, spokesmen for both the majority and minority stated that the issue should be left to the courts. 1 *ANNALS OF CONG.* 477, 485-86, 496, 505, 524, 540, 572, 582, 585 (1789-1791). To the extent that the issue would become involved in controversy between the Senate and the President, Gerry said, "let it go before the proper tribunal; the judges are the constitutional umpires on such questions." *Id.* at 491-92. "Some arbiter is almost indispensable when power . . . is also balanced between different branches, as the legislative and the executive . . . Each unit cannot be left to judge the limits of its own power." JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 9 (1941).

given to the courts; it has been exercised in disputes between two states, between the United States and a state, between a Department and an independent agency,⁷⁸³ and if we look to substance rather than form, between Congress and the President. Why should conflicting claims of constitutional authority by Congress and the President alone of governmental conflicts be insulated from judicial review? Increasingly, committees and members of Congress have shown a disposition to recognize that the courts have the last word,⁷⁸⁴ whereas, if one may judge from Attorney General Rogers' sadly mistaken argument against judicial jurisdiction,⁷⁸⁵ the executive branch considers itself beyond judicial reach, a view that is not conducive to executive responsibility.⁷⁸⁶ This "intolerably prolonged controversy," as the veteran Senator Neely said, must be submitted to the courts,⁷⁸⁷ both to preserve the congressional inquiry function from unwarranted executive interference and to protect the executive branch from congressional encroachment on its "exclusive province."

APPENDIX

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⁷⁸³ See notes 703, 721-22 *supra*.

⁷⁸⁴ See note 3 *supra*.

⁷⁸⁵ See text accompanying note 321 *supra*; see note 316 *supra*. Att'y Gen. Memo. 44-46, 72.

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EXECUTIVE PRIVILEGE, THE CONGRESS AND THE COURTS*

(Norman Dorsen¹ and John H. F. Shattuck²)

I. INTRODUCTION

The scene was the House of Representatives. The date April 22, 1948. The debate in progress concerned a report of the House Un-American Activities Committee, which had questioned the loyalty of a prominent government scientist. During the course of the debate, which centered on the refusal of President Truman to release the full text of an FBI letter concerning the accused scientist, one member of the Committee rose in the chamber and said:

"I am now going to address myself to a second issue which is very important. The point has been made that the President of the United States has issued an order that none of this information can be released to the Congress and that therefore the Congress has no right to question the judgment of the President in making that decision.

"I say that that proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason: That would mean that the President could have arbitrarily issued an Executive order in the Meyers case, the Teapot Dome case, or any other case denying the Congress of the United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision.

"Any such order of the President can be questioned by the Congress as to whether or not that order is justified on the merits."

The speaker was Congressman Richard M. Nixon of California. . . .

It is clear, as this episode illustrates, that the Executive's claimed privilege to withhold information from Congress has more than one side and is often clouded by political controversy. Perhaps this is so because the issue has developed as a by-product of the often turbulent relationship between the two "political" branches of government, and so far has eluded resolution through the courts. In any event, its resolution appears to be more remote today than it was in 1792, when President Washington first raised the issue by urging a House Committee to withdraw its request to inspect executive documents about Major General St. Clair's military disaster in the Northwest. The first President turned the documents over only when the Committee declined to withdraw its request.

The doctrine of executive privilege has proliferated over the decades very much as executive power itself has grown. The origins of the doctrine were modest, asserted by early presidents rarely, in narrow circumstances and, as we shall see, often under a formulation which implied that the Executive could withhold information only with the consent of Congress.

Modern presidential government, on the other hand, is symbolized by the frequency with which information is withheld from Congress at the sole discretion of the Executive. The Library of Congress reported this year that executive privilege has been asserted 49 times since 1952—more than twice the number of all prior claims. The Nixon administration, while professing that it has done more than its predecessors to regularize the flow of information to Congress, has in fact broken all records for the frequency of its assertions of privilege by formally denying information or witnesses to Congress nineteen times in four years. On four such occasions the President himself claimed executive privilege, while cabinet members and agency heads have done so 15 times on his behalf.

A second indication that executive privilege is a vital pressure point in the struggle between Congress and the President is the frequency with which it is used to cut off congressional inquiry into the very issues over which Congress and

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the President are most sharply divided. By withholding crucial information or witnesses modern presidents have discovered that they can exercise an effective veto over attempts by Congress to act in certain areas, particularly foreign affairs. It should come as no surprise, therefore, that General Maxwell Taylor declined to appear before the House Subcommittee on Defense Appropriation in April 1963 to discuss the Bay of Pigs invasion; that Treasury Secretary Connally declined to testify before the Joint Economic Committee in April 1972 on the refusal of his subordinates to supply records to the General Accounting Office on the government's loan to the Lockheed Aircraft Corporation; or that the Department of Defense refused in December 1972 to supply documents requested by the House Armed Services Committee during its hearings on the firing of General John D. Lavelle, who reportedly conducted unauthorized raids over North Vietnam. The most recent example of an attempted veto of a line of legislative inquiry is President Nixon's refusal, until events required a reversal of position, to permit White House aides to testify before the Senate committee investigating the Watergate matter.

Incidents like these have helped to create an impression that the Executive often balks at requests for information simply in order to prevent certain controversial subjects from being further explored by a hostile Congress. Indeed, General Taylor candidly admitted as much when he declined an invitation to testify about the Bay of Pigs invasion by stating that his appearance would "only result in another highly controversial, divisive public discussion among branches of our Government which would be damaging to all parties concerned." Nor is this assumption about controversy and divisiveness unfounded, since the modern doctrine of executive privilege is in many respects a product of the efforts of the Eisenhower Administration in 1954 to block investigation conducted by Senator Joseph McCarthy.

It will be recalled that the Senator, as part of his celebrated probe into the loyalty of Army personnel, sought details on individual cases, and in particular the appearance before his committee of Army loyalty board members who deliberated and voted on these cases. The Eisenhower Administration was understandably fearful that if loyalty "judges" were forced to account to Senator McCarthy it would have been impossible to assure fair and uncowed decision-making. The Administration therefore refused to provide the requested information and to allow the loyalty board members to testify. Later, during the Army-McCarthy hearings, President Eisenhower issued a statement, about which we will have more to say later, formally rejecting McCarthy's requests.

This was a wise and necessary decision. But the Justice Department memorandum that accompanied the President's statement was written in broad and unqualified terms, often embroidering history. It has spawned a conception of executive privilege that is indefensible in law and mischievous in practice, and indeed is at the root of our present constitutional crisis.

II. EXECUTIVE PRIVILEGE AND GOVERNMENT SECRECY

Secrecy in government has assumed different forms from one administration to the next, but its central and consistent premise is an assumed right of the President acting in the public interest to withhold information which he has acquired in the course of executing the laws. This premise is most clearly reflected in formal claims of executive privilege, but it also may be found in a wide variety of other forms of secrecy behind which the Executive Branch attempts to conduct its operations without "interference" from the coordinate branches of government, or from the public.

The institutional patterns of executive secrecy are perhaps best established in matters of foreign affairs. Whenever the Departments of State or Defense are compelled before the judiciary to articulate why foreign affairs must not be impeded by openness, they resort to the florid language of the Supreme Court in *United States v. Curtiss-Wright Export Corporation*, language which is often cited today as the basis for executive secrecy in other areas as well:

"In this vast external realm, with its important, complicated, delicate and manifold problems, the President has the power to speak or listen as the representative of the nation. . . . He has his agents in the form of diplomats, consular and other officials. Secrecy in respect of the information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful

results. . . . The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all measures, demands or eventual concessions which may have been proposed or contemplated, would be extremely impolitic."

When the Executive acts in areas colorably touched by foreign affairs, it is protected by a variety of shields, some of which are sanctioned by Congress, some by the courts, and some by both. It need not, for example, engage in public rule making, since the procedural requirements of the Administrative Procedure Act do not apply "to the extent that there is involved a military or foreign affairs function of the United States." This significant statutory exemption means that an agency is not required to give notice through the Federal Register or otherwise of rules or other decisions it is considering promulgating; nor to describe the proposed rule or decision and its underlying authority; nor to give interested persons an opportunity to participate through submission of written views; nor to render decisions supported by a record and stating the basis and purpose of the decision. Since these administrative formalities are dispensed with when the Executive acts in foreign affairs, secrecy in this area is not difficult to enforce. Moreover, it is sanctioned by Congress and therefore is not necessarily derived from any inherent executive power.

A second shield behind which the Executive can act in secret—even outside the area of foreign affairs—is ironically the Freedom of Information Act. While the purpose of the Act is to establish a general rule that government agencies should make information available to the public upon demand, the rule does not apply to nine enumerated categories of information, chief of which are foreign affairs, internal agency memoranda, investigative files compiled for law enforcement purposes, and information the disclosure of which would constitute an unwarranted invasion of personal privacy.

Since the hand of Congress is at work in the Information Act, one must conclude here as with the Administrative Procedure Act that Congress itself has recognized at least the occasional necessity of executive secrecy. While Congress may not have intended to concede that the exemptions from the Act justify the withholding of information from itself, the only instance in which members of Congress have sought to use the affirmative provisions of the Act to compel the production of documents from an executive agency resulted in a decision by the Supreme Court sustaining the agency's refusal to disclose, on the ground that the documents were covered by the foreign affairs exemption. In that case, *Environmental Protection Agency v. Mink*, however, the Congressmen were suing in their private capacities, and the power of Congress to override a mode of secrecy which it had itself created was not at issue, nor did the executive agency claim a privilege to override Congress.

A third form of executive secrecy, created not by Congress but by the executive bureaucracy itself, lies at the outskirts of the formal doctrine of executive privilege. Each of the last three presidents has made a formal commitment to Congress not to invoke executive privilege without specific presidential approval. Most observers agree, however, that this commitment has been reduced to a nullity by the simple bureaucratic expedient of evading requests for information without resorting to claims of executive privilege. So common are these tactics, Senator Fulbright recently pointed out, that "[a]s matters now stand, the commitment has been reduced to a meaningless technicality; only the President may invoke executive privilege but just about any of his subordinates may exercise it—they simply do not employ the forbidden words."

Information is withheld from Congress on at least three levels. At the highest level are the few instances in which the President himself personally directs a subordinate not to comply with a congressional request. More frequent are occasions when executive departments formally decline on their own initiative to cooperate with congressional inquiries, and the President does not direct them to do otherwise. In March 1970, for example, the Senate Constitutional Rights Subcommittee began a two year probe of the Army's surveillance of domestic politics. In the ensuing war of attrition which was waged by the Pentagon, three generals, the Secretary of the Army, its general counsel and several of their subordinates declined to testify or respond in writing to questions about the scope and basis of the Army's surveillance activities. At the same time they

delayed for more than three months in complying with a request from the subcommittee for certain documents and computerized surveillance records compiled by the Army and disseminated widely to other agencies of government.

The Army's excuses for not complying with these requests were an awesome display of the arsenal of executive secrecy. Documents and witnesses were withheld for fear of prejudicing current departmental investigations into the very subject of the congressional probe. The generals were shielded at first because they were stationed overseas, and later because the Secretary of Defense determined they were not the proper persons to speak for the Department on the "broader issues" facing the subcommittee, notwithstanding their personal knowledge and direction of the Army's surveillance operations. A further reason for not producing the generals was the Army's assertion that it is the policy of the executive branch not to present intelligence personnel before congressional subcommittees.

A copy of the computer printouts which formed the bulk of the surveillance product was withheld from the subcommittee long after the Army claimed that it had ordered the destruction of the printouts and discontinued collection of most of the information. Among the reasons given were that release of the documents would violate the privacy of the persons whose names appeared on them, although the subcommittee had guaranteed that names would be eliminated prior to publication. When part of the printout was finally released after eighteen months of tactical maneuvering by both sides, the Army classified it confidential, and at first applied the same classification to the subcommittee's report so that it was not published until more than two and one-half years after the investigation began.

The third and still more frequent way in which information is withheld are the countless struggles between congressional staffs and the lower levels of the federal bureaucracy over information to which no colorable claim of privilege could attach, but which is nevertheless withheld because of the general climate of secrecy and self-protection in which the Executive Branch operates in its relations with Congress.

A startling example of the obstacles encountered at this third level of informal "privilege" was the experience of a bipartisan group of 130 Congressmen in attempting between 1966 and 1968 to compile an exhaustive list of federal assistance programs. The resistance of the administering agencies was often bizarre; the telephone directory of the Office of Economic Opportunity was at first withheld because it was classified "confidential;" and current eligibility requirements for certain programs were withheld because, in the words of one particularly stubborn bureaucrat, "the programs and their personnel change so rapidly."

Executive secrecy has increasingly come to symbolize the troubled relations between Congress and the President, and to identify their points of sharpest conflict. Since executive privilege is at once the most refined form of government secrecy and the most direct Executive challenge to Congress, it is difficult to understand how one recent commentator on the subject could contend that executive privilege "is not one of the central issues of our time, but merely a moderately interesting question that has attained importance largely because of other issues of conflict between the executive and the legislature." On the other hand, this is generally the conclusion of the Executive branch itself—a conclusion undoubtedly colored by the fact that it is the congressional ox that is being gored. Perhaps a more dispassionate view of the subject is required to place it at its proper level of constitutional importance. In practical terms it is undeniable that executive privilege often interferes with the legislative work of Congress. As Senator Fulbright tersely pointed out after President Nixon had effectively vetoed further inquiry by the Senate Foreign Relations Committee into grants of foreign military aid by claiming executive privilege over certain Defense Department documents, the President's action "makes it most difficult to legislate in the area of foreign military assistance."

III. THE CLAIM OF A DISCRETIONARY EXECUTIVE PRIVILEGE TO WITHHOLD INFORMATION FROM CONGRESS

Attorney General Richard Kleindienst, speaking for the Nixon Administration, recently asserted that the Congress had no power to order an employee of the executive branch to appear and testify before Congress if the President barred such testimony. It is important to distinguish the several strands in his testimony. First, its breadth. Mr. Kleindienst did not limit the application of the privilege to Mr. Nixon's personal advisors in the White House or to persons play-

ing a policy making role in other parts of the executive branch. Nor did he limit in any other way the range of individuals who might claim the privilege; his assertion was that *all* employees of the federal government could be totally insulated from Congress at the order of the President.

Second, the Attorney General did not spell out in any detail the constitutional or other legal basis for this sweeping power. As we shall see, the legal questions are complex, and must be dealt with if a confident conclusion is to be reached regarding the nature and scope of any executive privilege.

Third and most important, the Attorney General claimed that the President's judgment on whether to produce documents or witnesses to the Congress was final; that the decision was his and his alone to make and neither the Congress nor the courts had the constitutional authority to interfere.

It was not always so. Even while the Executive branch during previous administrations was asserting a broad privilege, there were many attempts to define its contours and a hesitancy to proclaim an unreviewable presidential discretion.

The first major assertion of executive privilege during the modern presidential era came in 1941 when Attorney General Robert Jackson declined to comply with a request by the House Committee on Naval Affairs to inspect FBI reports on the strikes and labor disputes then plaguing defense industries and jeopardizing the war effort. The Attorney General's letter explaining his action covered a great deal of territory in a somewhat random fashion. It asserted on one level that the documents were "investigative reports" the disclosure of which "could not do otherwise than seriously prejudice law enforcement." On a second level the Attorney General claimed that release of the documents would also prejudice the national defense. Finally, a third justification was offered which purported to recognize (1) the difference between public disclosure and disclosure to a committee of Congress, and (2) the power of the Executive to withhold information even from Congress when "access . . . would not be in the public interest." Jackson's letter, while gratuitously observing that the documents in question "can be of little if any value in connection with the framing of legislation or the performance of any other constitutional duty of Congress," did not assert an unreviewable executive power to withhold information from Congress. That claim was reserved for a later day.

On May 17, 1954, President Eisenhower sent a letter to Defense Secretary Charles Wilson with an accompanying memorandum from Attorney General Brownell, directing the Secretary to order his subordinates not to testify, on the ground of executive privilege, before Senator Joseph McCarthy's special subcommittee of the Senate Government Operations Committee. However laudable the purpose behind this blanket assertion of privilege, the Attorney General's claim at the time that "courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold [from Congress] information and papers in the public interest" was remarkably inexact. No authority was cited, nor was there any that could have been, since the courts had never considered the issue. Nevertheless, the Brownell memorandum became the basis for an unprecedented 34 claims of privilege during the remaining five years of the Eisenhower Administration. More important, as expanded and codified in 1957 by Attorney General William Rogers, the Brownell memorandum had a profound impact on the doctrinal development of executive privilege. As stated by Mr. Rogers, while heads of departments—

"... have frequently obeyed congressional demands . . . and have furnished papers and information to congressional committees, they have done so only in a spirit of comity and good-will, and not because there has been an effective legal means to compel them to do so."

Perhaps because the presidency and the Congress were controlled by the same political party, the issue lay largely dormant during the Kennedy and Johnson administrations, although President Kennedy in his own name once exercised executive privilege, and executive departments and agencies did so three times during each of the Democratic administrations.

Even before Mr. Kleindienst threw down the gauntlet, there were signs that the present administration was escalating the warfare over the executive privilege. One may refer not only to the increasing number of occasions when the privilege was exercised, but also to the nature of the justifications. Dean Roger Cramton, former Assistant Attorney General for the Office of Legal Counsel, recently defined the privilege in terms reminiscent of the Brownell memorandum as "the constitutional authority of the President to withhold information

from Congress" and he suggested that it would not be "wise to invite the judiciary to resolve for all time issues that are best left to the accommodations and realities of the political process." While Dean Cramton stopped short of asserting unreviewable executive discretion, and in any case was speaking unofficially, there was an implication—later to be confirmed by the Attorney General—of sweeping presidential authority.

It is important at this juncture to identify the subject matters that have been included in the executive privilege as it has been broadly asserted. Attorney General Rogers identified at least five categories of executive information privileged from disclosure to Congress:

1. military and diplomatic secrets and foreign affairs;
2. information made confidential by statute;
3. investigations relating to pending litigation, and investigative files and reports;
4. information relating to internal government affairs privileged from disclosure in the public interest; and
5. records incidental to the making of policy, including interdepartmental memoranda, advisory opinions, recommendations of subordinates and informal working papers.

Former Assistant Attorney General Cramton recently consolidated these sweeping claims by asserting that executive privilege is most frequently and justifiably exercised in only three of these areas: (1) military and foreign affairs; (2) investigatory files of law enforcement agencies; and (3) testimony of presidential advisors. Mr. Cramton's one deviation from the formulation of Generals Rogers and Brownell is his limitation of the privilege to advisors *to the President* and not to all members of the executive branch. On the other hand, Mr. Kleindienst's recent claims exceed even those of the Eisenhower administration because the latter sought to insulate not all executive branch employees but only those who were engaged in the "making of policy."

In the remainder of this paper we shall express our reasons for concluding that the assertion of a discretionary privilege in whatever form by the President is without basis in historical or judicial precedent or in the constitutional doctrine of separation of powers. We shall also try to show that two of the three basic categories of privilege—national security and investigatory files—while raising issues about the propriety and scope of executive secrecy, can be explained and defined wholly apart from a constitutional privilege. The third category—internal advice within the executive branch—raises more difficult problems. While there may be a necessity for executive secrecy in this area, it is based on the same limited constitutional premise that justifies secrecy among members of Congress and judges as well as executive officials: each branch of government has an implied power to protect its legitimate decision-making processes from scrutiny by the other branches. As we shall see, however, this does not mean that any branch, including the Executive, can keep secret its decision or the facts underlying them or shield wrongdoing by its officials or employees.

IV. THE UNTENABILITY OF A DISCRETIONARY EXECUTIVE PRIVILEGE

Attorney General Kleindienst's assertion of an unlimited executive privilege has been characterized by one lawyer for the Senate as a "blueprint for government by the President." As we have seen, however, Mr. Kleindienst is not the first Attorney General who has staked out such broad claims for the President. Indeed, his formulation is perhaps less dangerous than earlier ones because it is less defensible, coming as it does in circumstances where individual wrongdoing by presidential aides is directly at issue. This is the reason, presumably, that the President has decided to permit his subordinates to appear before Senator Ervin's committee (and respond to all questions.)

Although the President has made it clear that his largesse is intended "for this trip only," in our view the boundless claim of a discretionary privilege is unwarranted in any circumstance. There is, very simply, no support for it in history, in judicial decisions, or in the constitutional principle of separation of powers.

It is vital at the outset to be clear about the precise question before us, which is *not* whether there are certain types of information that the Executive needs to keep secret in order to function properly. There well may be. Nor is the question whether the Congress generally requires access to information in the hands

of the Executive in order to legislate properly. Of course it does. The issue is whether the President has the implied authority under the Constitution to withhold data from the Congress solely in his discretion, or whether his decision to do so is subject to constitutional limitation and judicial review.

A. The Practice of Early Presidents

It was not until 1835, during the presidency of Jackson—a full 46 years after the formation of the Republic and the enactment of the initial statute authorizing congressional inquiries into the workings of the Executive Branch—that there was an unequivocal assertion of discretionary power to withhold information from the Congress. The earlier incidents of executive questioning of Congressional authority during Washington's administration were cases in which the executive eventually acceded to the requests of Congress and never confronted the legislature with a refusal to disclose.

The one denial of a request for information by President Washington—a request from the House of Representatives for all papers related to the negotiation of the Jay Treaty—was based on his belief that the House lacked the power under the Constitution to demand documents related to the treaty-making power. The President conceded that the Senate could receive the documents. Both Washington, and later Adams, freely communicated to the House all information on external relations, including instructions to envoys negotiating treaties when such information might be relevant to Congress' war-making powers.

Nor do the incidents involving President Jackson provide clear-cut support for those seeking historical confirmation of Executive authority to withhold information. Jackson had conceded in 1834 that:

"Cases may occur in the course of its legislative or executive proceedings in which it may be indispensable to the proper exercise of its powers that it [Congress] should inquire or decide upon the conduct of the President, or other public officers, and in every case its constitutional right to do so is cheerfully conceded."

Then, in 1835, Jackson rejected a request for information regarding "frauds in the sale of public lands" because he said (1) the information was to be used by Congress in secret session and thereby would deprive a citizen of the "basic right" of a public investigation, and (2) the inquiry was not "*indispensable* to the proper exercise of Congress' powers." The first ground, if valid, related not to presidential prerogatives but to the separate question of the rights of individuals, about which we shall speak below. The second, more amorphous, ground is inconsistent with Jackson's own comment, quoted above, relating to the plenary power of congressional investigation, and also with the numerous precedents established by Washington, Adams and Jefferson in encouraging investigations into the conduct of public officers.

A similar incident involving President Tyler about a decade later is also indecisive. In 1843 Tyler questioned the right of Congress to certain reports relating to alleged fraud on the Cherokee Indians, asserting in a memorandum to Congress that there was a narrow area of information, of the type private *litigants* could withhold, that the Executive was not compelled to disclose. He disavowed—albeit in ambiguous language—an absolute discretion in complying with congressional requests. In fact, Tyler eventually made available all investigative reports on the incidents except the purely advisory opinions of his investigator of the Cherokee delegates.

During this same period, a congressional practice developed of extending to the President a privilege or discretion to withhold certain investigative reports and state secrets from public disclosure. The technique was used infrequently, and in each instance, according to Raoul Berger, "it was well understood to be a congressional dispensation and not a constitutionally-based presidential right."

An early and typical example was a resolution introduced in the House in 1798 calling for President Adams to disclose reports from American envoys in Paris, "or such part thereof as considerations of public safety and interest, in his opinion, may permit." After debate the discretionary language was struck from the resolution, but the House agreed to receive the documents in executive session in order to comply with the President's request that they be held confidential, at least "... until the members of the Congress are fully possessed of their contents, and shall have had an opportunity to deliberate on the consequences of their publication after which time I submit them to your wisdom." The House considered the reports in secret session and then decided to publish them. The result was the disclosure of the famous "X Y Z papers," which fanned popular

hostility toward France and ultimately led to congressional authorization of the Naval War of 1798-1800.

In the instances where the offer extended by Congress was actually accepted by the President and documents were withheld, the congressional power to compel their release was explicitly recognized by both parties. When Jefferson declined, for example, to produce certain information on the Burr conspiracy in 1807, he was acting upon a House request that excepted "such [information] as he may deem the public welfare to require not to be disclosed."

A similar grant of discretion was made to President Monroe by the House in permitting him to withhold certain correspondence relating to alleged misconduct of naval officers. Monroe carefully justified his decision not to disclose at that time in accordance with the terms of the House Resolution, and also left open the possibility that disclosure at a later date, after the trial of the officers was completed, would be appropriate.

Since Presidents Polk and Buchanan apparently recognized plenary power in Congress to investigate the Executive, the historical record until the Civil War does not permit an inference that the early Presidents or their subordinates possessed a discretionary power to withhold information from the Congress.

B. Judicial Decisions

The judicial record is equally barren of authority sustaining the broad claims of the Executive. Although no Supreme Court case explicitly rejects such a privilege, there are no decisions in this country or in England that recognize it. The Queen's Bench in 1845, for example, established what is still the rule in England today: "the Commons are . . . the general inquisitors of the realm. . . . They may inquire into everything which it concerns the public weal for them to know." The Massachusetts Supreme Judicial Court, in 1951, rejected an executive attempt to withhold a report on the ground that it involved an internal communication within the executive branch.

The most comprehensive attempt to muster judicial authority on behalf of an executive privilege was made by Attorney General Robert Jackson in his 1941 letter referred to above, declining to make available to the House Committee on Naval Affairs certain investigative reports of the Department of Justice arising out of labor disturbances in industries with naval contracts. While some of the cases cited by Mr. Jackson support a limited power to withhold security data and confidential informers' communications from the courts, none lends credence to a discretionary privilege of the kind now being urged by the executive branch.

Marbury v. Madison, the first case cited, is clearly inapposite. In that historic decision Chief Justice Marshall expounded the judiciary's authority to review all executive acts not constitutionally committed to executive discretion *and to determine which issues are precluded from review*. It is true, as he said, that investigation of the Executive's acts is "peculiarly irksome, as well as delicate," but the courts possess the authority and indeed have the duty to undertake this investigation.

Perhaps we should stop here, in accordance with an observation made later by Mr. Justice Jackson, that when the first of a string of citations fail to support an asserted proposition of law the lawyer has "a blunderbuss mind" and could not be relied on.

But we shall persist, even though the other cited cases produce no additional support for the position of Attorney General Jackson. The second case, *Totten v. United States*, did not involve executive privilege at all, but rather a secret contract between President Lincoln and a spy. The court refused to permit a suit based on the contract because acknowledgement of the contract was in itself a breach of its terms.

In the Aaron Burr case, President Jefferson eventually complied with a subpoena to produce a letter sent to him and left it to the court to suppress those parts of the letter not material to Burr's defense. In his opinion in the Burr case Chief Justice Marshall recognized a limited state secrets privilege, but he emphasized that the court must be satisfied that the need for secrecy outweighs the accused's interest in having access to the document.

Of the remaining federal cases cited in the Jackson letter, all but one involved either the government's right to protect the identity of informers and their confidential communications, or the right of government employees to refuse to disclose information pursuant to a regulation specifically authorized by Congress.

Two of the three state cases cited in the Attorney General's letter refer to an executive discretion to appear or furnish papers to a court. But these same

cases explicitly subject this discretion to judicial review and recognize the legislature's power to require executive disclosure. In the other state court decision the Executive had previously made the document available for inspection.

The judicial precedents therefore belie the claim of a discretionary executive privilege.

C. Separation of Powers

The historical precedents and judicial decisions unavailing, we turn to even more fundamental sources of potential power, in particular, the constitutional doctrine of separation of powers. Contrary to the view of some recent Presidents and their legal advisors, our understanding of the scheme and meaning of the Constitution suggests a strict limitation of the privilege. At the outset platitudinous generalities should be discounted. For example, former Attorney General Rogers has said in support of a discretionary privilege that "the separation of powers was . . . the very foundation of the Federal Government . . . and was regarded as the basic guarantee of the people against tyranny." But it is difficult to see why a refusal by the President to make information available to the Congress advances resistance to tyranny. There have been equally unavailing generalities uttered on behalf of the legislative branch. The essential task is to probe the meaning of separation of powers as it relates to the present problem. In our judgment, three distinct facets are involved, none of which supports executive discretion.

1. The first is the Article I power of the Congress to conduct investigations. Long before 1789 it was perceived that the English Parliament would be a mere appendage of ministerial government if it could not compel executive officers to explain their policies and reveal the facts on which those policies were based. Parliament did not merely seek explanations: it actively inquired, in the words of Pitt the elder, "into every step of public Management, either Abroad or at Home, in order to see that nothing has been done amiss." From the early seventeenth century this investigative power was very broad; in each instance of its use Parliament itself would determine the scope of its inquiry.

Perhaps the most dramatic example of an early parliamentary investigation was the inquiry into the administration of Robert Walpole during the two decades prior to his fall from power in 1742. The investigation was conducted in a climate of international and domestic crisis hardly conducive to parliamentary initiative. As Raoul Berger has noted in emphasizing the significance of this inquiry as a measure of Parliament's historic power to investigate:

"The times were stormy: England was at war with Spain: the opposition rattled the bones of disrupted continental alliances: they raised the dread spectre of civil war: and they played tattoo on the multitudinous dangers that would flow from a parliamentary inquiry. But to no avail. Member after member spoke for the right and the duty to inquire into the conduct of the administration and its ministers from the lowest to the highest."

Legislative practice in the American colonies followed the parliamentary model. Examples abound of investigations by colonial assemblies "into the conduct of the other departments of government." Typical was a resolution of the Pennsylvania Legislature in 1770 "order[ing] the assessors and collectors of Lancaster County to appear before the audit committee and to bring with them their books and records for the preceding ten years." Nor was this a haphazard colonial practice, abandoned during the Revolution. Most state Constitutions codified the legislative power to investigate in highly specific provisions like Article X of the Maryland Constitution of 1776, which gave the legislature authority to "call for all public or official papers and records, and send for persons, whom they may judge necessary in the course of inquiries concerning affairs related to the public interest." So deeply rooted was this legislative right of access to executive documents that the Continental Congress refused to create a Secretary of Foreign Affairs until a resolution was adopted that "any member of Congress shall have access [to] all . . . papers of his office: provided that no copy shall be taken of matters of a secret nature without the special leave of Congress."

While there is no express mention in the federal Constitution of a congressional power to investigate and gain access to the documents of executive departments, the practice was so well established by 1789 that such a power was assumed to be a fundamental attribute of Congress. In one of its first legislative acts, on September 2, 1789, Congress spelled out the reach of this implied power over the new Treasury Department by enacting a statute which remains on the books today:

"[It] shall be the duty of the Secretary of the Treasury . . . to make reports, and give information to either branch of the legislature in person or in writing

(as may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office."

This statute was drafted by Treasury Secretary Alexander Hamilton, hardly an advocate of limited executive powers, and whether or not he anticipated that its "sweeping mandate . . . wholly without limitation [would] fasten onto every conceivable activity of the Administration," he could not have been blind to the fact that the statute gave the Secretary no discretion to withhold information. Moreover, it is reasonable to assume that Hamilton would never have imposed a duty on an executive department to report to Congress unless he felt such a duty was constitutionally compelled.

During the first half of the nineteenth century, Congress conducted continuous investigations into the expenditure of public funds in virtually every area of government activity. The authority underlying these investigations was derived both from the Appropriations clause in Article I of the Constitution and from Hamilton's Treasury Reporting Act of 1789.

The range and depth of inquiry during this early congressional period can be illustrated by some random examples of House investigations. During the early nineteenth century, the House conducted broad inquiries into the operations of the Treasury Department (1800 and 1824), the War Department (1809 and 1832), government employees generally (1818), the Post Office (1820 and 1822), the Bank of the United States (1832 and 1834), the New York Customs House (1839), the conduct of Captain J. D. Elliott commanding a naval squadron in the Mediterranean (1839), the Commissioner of Indian Affairs (1849), and the Secretary of the Interior (1850). Congressional inquiries into the Executive were in fact so common during this period that a nineteenth century observer commented wryly that "Committees instituted inquiries, ran the eye up and down accounts, pointed out little items, snuffed about dark corners, peeped under curtains and under beds, and exploited every cupboard of the Executive household." It is hardly surprising, therefore, that Attorney General Cushing in a memorandum opinion of 1854 advised the President and all executive departments that "Congress may at all times call on [the Departments] for information or explanation in matters of official duty . . ."

An instructive definition of the scope of the investigating power is to be found in *Watkins v. United States*, where Chief Justice Warren said in 1957:

"The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."

The *Watkins* case is especially suggestive because it is chiefly remembered, and rightly, as a decision *restricting* the power of Congress, and in particular the House Committee on Un-American Activities. It is perhaps ironic that the same libertarians who sought to confine the power of Congress during the hegemony of Joe McCarthy are now championing the legislative cause. Be that as it may, in *Watkins* Chief Justice Warren explicitly stated that "broad as is this power of [congressional] inquiry, it is not unlimited." He went on to say:

"There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible."

This is the sum total of the limitations expressed by the Chief Justice, and it is plain that they do not support a discretionary privilege of the kind now being asserted by the executive. While there was a dissenting opinion in the *Watkins* case by Justice Clark, it took an even less restricted view of the investigative power of Congress. It is of course true that the decision dealt with the power of Congress to obtain information from a private individual, and it therefore would be disingenuous to suppose that the court was thinking of such recalcitrant matters as executive privilege. But it also is plain that its latitudinarian appraisal of congressional power is consistent with history and with earlier judicial pronouncements.

2. The second aspect of separation of powers concerns the implications of the President's Article II power to "take care that the laws be faithfully executed."

It is this general constitutional provision on which chief executives and their attorneys general have chiefly relied to buttress the claims of unlimited discretionary privilege to withhold executive documents and witnesses from the Congress.

Taken to its essentials it is a claim of inherent or implied power, because the general constitutional language surely does not authorize any such broad discretionary withholding. To the extent that the Executive branch has an implied power to maintain confidentiality, it is a power identical to that of judicial and legislative branches to protect their internal decisionmaking processes. As we shall see, no branch of government can perform its assigned constitutional function unless its employees are encouraged freely to voice their opinions without fear of external scrutiny. It does not follow, however, that the Executive power to maintain secrecy is inherently greater than that of the two other coordinate branches of government, nor that the Executive has an unreviewable discretion to withhold information from Congress in order to frustrate the legislative power of investigation.

It would be tempting to dispose of the inherent power issue summarily in reliance on the Steel Seizure Case, where Justice Black, speaking for the Court, rejected in comprehensive terms the claim of an inherent presidential power to override the will of Congress. There President Truman was denied the authority to seize steel mills during the Korean War in order to maintain needed production. In concluding that "The Founders of this Nation entrusted the law-making power to the Congress *alone* in good and bad times," the Court accepted the conclusion of Justice Holmes, among others, that "The duty of the President to see that the laws be faithfully executed does not go beyond the laws. . . ." Former President William Howard Taft put it this way:

"The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the federal constitution or in an Act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. . . ."

It is unnecessary to accept Justice Black's broad assertion about the lack of presidential power to reach his conclusion. In a more discriminating analysis in the same case, Justice Jackson distinguished three situations—those in which the President acts pursuant to an express or implied authorization of Congress, where his authority is at a maximum; those in which Congress is silent, where the President can rely only on his own powers and frequently the result is uncertain; and those in which the President takes measures "incompatible with the expressed or implied will" of Congress. In the latter situation, according to Justice Jackson, and at least two other Justices in the Steel case, the President's power "is at its lowest ebb."

The case of executive privilege is plainly of the third type. While Congress has not legislated explicitly on the privilege, it has expressed its intention unmistakably to obtain all necessary information from the executive branch in statutes going back to the Hamilton Treasury Reporting Act.

Another clear expression of congressional intent is found in Title 5 U.S.C., Section 2954, enacted in essentially its present form in 1928. This provision requires the executive to submit to the standing Committees on Government Operations of the House and Senate "any information requested . . . within the jurisdiction of the committee." The jurisdiction of these Committees extends to any malfeasance, incompetence, corrupt or unethical practice in the operations of a branch of the government and any improper expenditure of government funds. Nor was this statute novel. Even before this far reaching provision, Congress had enacted a series of laws requiring extensive disclosures by executive departments on the use of appropriated funds. The Budget and Accounting Act of 1921, for example, requires all executive departments to "furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require them." The Comptroller General is the administrative director of the General Accounting Office, an investigative arm of Congress.

Relevant also are the specific statutory provisions designed to prevent interference with the free flow of communications to Congress. As early as 1912, in the Lloyd-LaFollette Act, Congress prohibited any infringement of the right of government employees to furnish information to a member or committee of Con-

gress. A subsequent statute, passed in 1948, imposed criminal penalties on anyone who influenced or threatened a witness in congressional proceedings.

The congressional will being clearly manifested in these and other laws, the formulation of Justice Jackson, which is more solicitous of executive powers than Justice Black's opinion for the Court, would deny the President inherent and discretionary power of the sort now being claimed.

Two other considerations, one textual and one rooted in history, support this conclusion. Concerning text, the only reference to secrecy in the Constitution is the power given to Congress to keep and publish Journals, except "such parts as may in their judgment require secrecy," and the only reference in the text to making information available to another branch of government is the duty imposed on the President "from time to time to give to the Congress information of the State of the Union." How much can one read into these clauses? Probably nothing definitive, because their origins are shrouded and their purposes differ. But their presence in the Constitution cuts, as law teachers like to say, in the direction of legislative access to executive documents and away from executive discretionary authority.

Cutting in the same direction is the fact that the framers of the Constitution, fresh from bouts with English kings, were more concerned about the dangers of presidential than congressional domination. Some recent writers have pointed to isolated evidence of the Framers' fear of the "despotic tendencies of the legislature," and of "legislative tyranny." Nevertheless, the historical data, as shown by Professor Berger, reveals a consensus in the Constitutional Convention and in the early histories of state governments that "the executive magistracy" was the natural enemy, the legislative assembly the natural friend of liberty. . . . As Justice Brandeis once said, the English and American people "must look to representative assemblies for protection of their liberties." The case against executive autonomy is thus advanced.

Other portions of the Constitution are of little help. Some informed observers have stressed the inherent weakness of the President. For example, Professor Bishop has minimized the danger to constitutional government by "an executive which has to go to Congress for every cent it spends, which has no power by itself to raise and maintain armed forces and which cannot jail its citizens except under a law passed by Congress and after proceedings presided over by an independent judiciary."

But Bishop wrote in 1957, during the incumbency of a passive President. In light of recent events, he might have stressed other constitutional powers which lead in a different direction—for example, the President's role as Commander-in-Chief and his *de facto* status as virtually sole representative of the United States in foreign affairs. Even more important perhaps than the powers explicitly found in the Constitution or those fairly implied are the numerous examples, apparently multiplying in recent years, of Executive action that seems to go beyond traditional bounds. For instance, Professor Kurland has recently prophesied, without enthusiasm, that

"We will continue . . . to see the President wage war without Congressional declaration, to see executive orders substitute for legislation, to see secret executive agreements substitute for treaties, and to see Presidential decisions not to carry out Congressional programs under the label of 'impoundment of funds.'"

Other examples are available. The President has recently expanded the use of the Pocket Veto, has tightened White House budgetary controls over what used to be known as the "independent regulatory agencies, and has twice devalued the dollar by executive action although a 1945 statute provides that only Congress can set the price of gold. Taken as a whole, these represent a significant change in the balance of power between the executive and legislative branches. An experienced foreign observer, Louis Heren, recently stated:

"... the main difference between the modern American President and a medieval monarch is that there has been a steady increase rather than diminution of his power. In comparative historical terms the United States has been moving steadily backward."

All this suggests that we should be slow indeed to permit the executive branch to accrete further power by uncontrolled discretion over the information it provides a coordinate branch. To acknowledge such power would increase the constitutional imbalance at a time when counter measures seem called for.

There are further aspects of the problem which underscore the danger of uncontrolled executive discretion: the vast expansion in the size and role of the White House staff, and the recent practice of assigning one person the dual role of cabinet officer and presidential advisor on the White House staff. The

former problem is partly a matter of numbers. During 1971 Dr. Kissinger directed a National Security Council staff of more than 140, of whom 54 were substantive experts—a long way, indeed, from the small and rather clubby retinue of earlier presidents. Dr. Kissinger as well as Messrs. Haldeman, Ehrlichman and other key figures on the burgeoning White House “staff” direct and participate in many governmental committees that cover the entire range of foreign and domestic security matters. Yet the Congress is denied the opportunity to question them, in a formal way, regarding their activities or knowledge or opinions. This situation is not, let us be clear, solely the result of action taken by the present administration; the growth of the White House has been steady since the Roosevelt years.

The second problem—multiple executive responsibilities—is even more serious. A cabinet member who is called to testify on the actions of his department may be asked questions which touch on his activities as advisor to the President. Former Assistant Attorney General Cramton has stated that while the first “is a proper inquiry, the latter is subject to a claim of executive privilege.” He acknowledges, however, that “the matters shade into one another and the distinction is difficult to maintain, especially when a cabinet member is housed in the White House and has a separate role as Counselor to the President on specified matters.”

These modern developments emphasize the intellectual difficulty of accepting the President as final arbiter of the issue. For it is the President who decides the size of the White House staff, the allocation of responsibilities between it and the cabinet departments, and whether or not to fuse in one individual both line and staff assignments that formerly were kept distinct. To permit the President also to determine, finally, when an individual may be immunized from legislative questions or a document sequestered is surely to defeat the goal of a balanced federal government.

3. Closely related to the President's power faithfully to execute the laws is the question, also an aspect of separation of powers, of the role of the courts in resolving the problem of executive privilege. In our judgment, if an issue concerning the privilege cannot be negotiated, it should be for the Supreme Court to decide. Neither the President nor the Congress should be the judge in its own cause. Accordingly, just as we deny the right of the President to determine the issue finally, we also reject the suggestion that a Senate committee should be “the final judge on whether a White House aide could refuse to answer any of the committee's questions.”

There are technical questions to be faced here—the existence of a case or controversy, of proper standing, and of the possibility of a “political question” not meet for judicial determination. Analysis of these questions we postpone until a later portion of this paper. Here we merely refer to the general responsibility of the courts to decide cases that involve disputes over the allocation of power as between the political branches of the federal government.

While there have not been many such incidents, there have been some, and the net result points in the direction of judicial action, particularly since the scope of conflicting constitutionally implied power is at issue. The Supreme Court, for example, ruled on the power of the President as Commander-in-Chief to order a blockade in the early nineteenth century without Congress' approval. The Court also, as we have seen, determined the scope of presidential power, during the Korean War to seize private property without congressional authorization. The Court has declined, it is true, to rule on the legality of the Vietnam War in the face of persistent claims that only Congress had the power to send the nation into combat on a large scale. But this was a discretionary abdication by the Court, and a dubious one at that. Moreover, at least two courts of appeal have examined the merits and decided that Congress, through the appropriation of funds, had sufficiently authorized the war within the meaning of the Constitution.

Of course there will be difficulties concerning a judicial resolution of a claim of executive privilege, assuming a proper controversy reaches the courts. But these difficulties pale in comparison with the present position, in which two unacceptable solutions are possible. The President may continue to be the final arbiter, in flat conflict with elementary notions of justice as well as the precept embodied in the Federalist Papers that “Neither the executive nor the legislative can pretend to an exclusive or superior right of settling the boundaries between their respective powers.”

Or executive privilege controversies will be settled, *ad hoc*, by what has been called “the accommodations and realities of the political process.” It is possible

to sympathize with the desire of some to keep the issue in play, to leave options flexible and hard questions unresolved. Epitomizing this view was former Secretary of State, Dean Acheson, who testified before the Senate that the "gulf" between the executive and legislative branches cannot "be cured by law." Many differences and problems cannot be cured by law, but it is our thesis that this is not one of them. We are not dealing with a private difference of opinion, but of the constitutional powers of two branches of government. The opposite of law is lawlessness—the current state of affairs. Accordingly, we have no hesitation in recalling here the injunction of *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is."

We are not unmindful that the process of political accommodation endorsed by Mr. Acheson, among others, permits judicious leaks of information from the Executive to the Congress that could not be provided on the record, as well as the familiar informal meetings between congressmen and presidential advisors at which, presumably, valuable data is provided—in short permits a flexibility in the deliverance of information that many will regard as satisfactory. We reject this *modus operandi*, however, and we are pleased that many congressional leaders likewise reject it. A surreptitious and informal means of communication demeans the Congress and indeed the entire governmental process. In addition, information acquired in this way is not on the record, and therefore is not usable in any stable way by other members of Congress or the public. We agree with Justice Brandeis that "sunlight is the best disinfectant;" we do not regard the "leak" or the "Old School Tie" as satisfactory substitutes for open testimony that the executive branch must be able to defend publicly.

V. THE PROPER SCOPE OF THE PRIVILEGE ASSERTABLE BY THE EXECUTIVE BRANCH

If our conclusion is correct that a discretionary executive privilege is untenable, this does not foreclose the question whether secrecy can properly be maintained by the President and his assistants in the three types of cases where a privilege has been asserted: foreign or military affairs, investigatory files and litigation materials, and advice within the executive branch. We shall now explore each of these areas of interest.

A. Foreign or Military Affairs

A degree of executive secrecy is probably necessary in foreign or military affairs, as the Supreme Court has asserted in the *Curtiss-Wright* case. But the Congress must have access to foreign and military information insofar as it is to exercise its express constitutional powers under Article I to advise the President in making treaties, to declare war, and to appropriate funds for raising and supporting armies.

Congress can, should and has delegated authority to the President to shield certain foreign and military activities from the public. It has authorized him to enforce administrative secrecy through the espionage laws and the classification system. Congress also can and should grant the President statutory authority to withhold certain information from Congress itself, the disclosure of which would cause immediate and irreparable injury to the nation. To conclude from this, however, that the President can, if he chooses, override Congressional requests for information relating to foreign and military affairs by asserting an unreviewable privilege is fallacious. Indeed, many federal court litigants in recent years challenging the legality of the undeclared war in Vietnam have documented a constitutional crisis brought on in part because of the repeated refusals by four presidents to disclose to Congress full data about the conduct of that war.

There are statutory sources for secrecy in foreign and military affairs which reflect the exercise of Congressional power. To give one illustration, the classification system administered by executive departments pursuant to Executive Order specifically derives its authority from provisions of the Espionage Act, the National Security Act of 1947, and the Atomic Energy Act of 1954. In the Freedom of Information Act, moreover, Congress has incorporated by reference the provisions of the Classification Order in exempting from the mandate of the Act matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." This reference, however, does not mean that the constitutional authority to classify information rests solely with the President. The Supreme Court stated this term that the Executive Order on classification could not survive a Congressional challenge by way of new legislation, Justice White pointing out in the *Mink* case that "Congress could certainly have provided that the Executive Branch adopt new procedures

[for classifying documents], or it could have established its own procedures. . . ." To complete the circle, President Nixon, in March 1972, cited the exempting provision of the Freedom of Information Act as statutory authority for instituting reforms in the classification system through a new Executive Order.

Congress, therefore, is theoretically an active partner with the President not only in conducting foreign affairs, but in maintaining a system of confidentiality, balanced against the public's right to know what its government is doing in its name. It is because of this shared constitutional responsibility that a House subcommittee chaired by Congressman William Moorhead recently recommended the establishment of an independent Classification Review Commission to be composed of members appointed both by Congress and by the Executive. In the view of the committee chairman, the Commission "would have broad regulatory and quasi-adjudicatory authority over the . . . classification system. [It] would also have the responsibility of settling disputes between Congress and the Executive over access to both classified and unclassified types of information requested by Congress. . . ."

Any argument that the Executive might make about possible breaches in security resulting from unimpeded Congressional access to classified information can readily be answered in both constitutional and practical terms. First, the argument rests on a premise rejected long ago by Chief Justice Marshall—that if a power derived from the Constitution might be abused, it should be denied. On a practical level any claim by the Executive that Congress cannot keep secrets has the sound of the pot calling the kettle black. The Executive's political use of classified information to gain the upper hand on Congress is too well documented to require elaboration here. Congressman Moorhead has summarized the practice well:

"On the one hand, the full power of the government's legal system is exercised against certain newspapers for publishing portions of the "Pentagon Papers" and against someone like Daniel Ellsberg for his alleged role in their being made public. This is contrasted with other actions by top Executive officials who utilize the technique of "instant declassification" of information they *want* leaked . . . Such Executive branch "leaks" may be planted with friendly news columnists. Or, the President himself may exercise his prerogative as Commander-in-Chief to declassify certain information in an address to the Nation or in a message to Congress seeking additional funds for a weapons system."

The Pentagon Papers are a prime example of the kind of information improperly withheld from Congress under a spurious claim of executive privilege before they were released to the press by Daniel Ellsberg. On December 20, 1969 Defense Secretary Laird in a letter to Senate Foreign Relations Committee Chairman Fulbright explained that the documents could not be made available to the Senate because they contained "an accumulation of data of the most delicate sensitivity, including National Security Council papers and other presidential communications which have always been considered privileged." As Senator Fulbright pointed out in his response, this assertion of privilege went to the heart of the problem of Congress' waning foreign policy role:

"If the Senate is to carry out effectively its Constitutional responsibilities in the making of foreign policy, the Committee on Foreign Relations must be allowed greater access to background information which is available only within the Executive Branch than has been the case over the last few years."

To the extent that the Pentagon Papers contained purely advisory communications, however, the President, as we shall explain more fully below, could properly have ordered that such advice be excised from documents released to the Congress.

In summary, there is probably a need for secrecy in foreign and military affairs. This means that information properly classified pursuant to statutory authority may be withheld in certain circumstances from the general public and provided to reliable persons within the executive branch on a need to know basis. But this conclusion provides no justification for denying Congress the foreign and military information it requires in order to fulfill its constitutional responsibilities. Accordingly, Congress has the power to compel production of such information by statute or Congressional resolution.

B. Investigatory Files and Litigation Materials

The second major category of information frequently included under the umbrella of executive privilege is information which the government may have to produce in court—principally investigatory files and other litigation mate-

rials. Roger Cramton recently described this as a "widely accepted legitimate area of executive privilege," agreeing with Attorney General Jackson that disclosure of investigatory files would prejudice law enforcement, impede the development of confidential sources, and result in injustice to innocent individuals.

It is unnecessary to dispute the validity of these conclusions to demonstrate that investigatory and litigation files need not be protected from unwarranted disclosure to Congress by anything so grand as an executive privilege. The government's law enforcement interest, as well as the privacy of individuals under investigation, are amply safeguarded by common law evidentiary privileges and by the statutory exemptions from the Freedom of Information Act. Unlike the blunderbuss of an unreviewable executive privilege, moreover, these other doctrines assimilate and attempt to balance competing interests in disclosure which are frequently advanced by private litigants, by Congress and by the public. Furthermore, it would be difficult to imagine a greater inconsistency in the law than that a private litigant could compel the disclosure of information from the Executive not accessible to Congress. But this is precisely the effect of extending executive privilege into the area of investigatory files and litigation materials.

The hallmark of the evidentiary privileges, which protect not only investigatory information but also "state secrets," is that the *judiciary* and not the executive determines when the circumstances are appropriate for a governmental claim of privilege. To invoke the court's power to review such a claim, a private litigant need only show, to the extent required by the Federal Rules of Civil and Criminal Procedure, that the information he is seeking to discover is "relevant" to his criminal defense or civil claim.

Once over this hurdle of relevancy, the litigant may seek to have the court apply the following general rules in considering the government's claim. First, the information at issue must be submitted to the court for an *in camera* inspection to determine whether it is properly covered by the privilege, and if so whether the government's interest in non-disclosure outweighs the private litigant's need for the information to prove his case. Where classified information is not involved, the courts generally reject government claims of a confidential privilege for any *factual* content in investigatory reports. Second, if the information is not privileged or if the litigant's need for proof is greater than the government's interest in confidentiality, the government cannot be ordered to disclose the information upon pain of contempt, but it can be compelled to choose between losing its case or dropping its prosecution and producing relevant documents which it claims are privileged.

The Congress has demonstrated a sensitivity to the Executive's need for confidentiality in this area by enacting exemptions to the Freedom of Information Act which protect both "investigatory files compiled for law enforcement purposes," and "files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." It is significant again that the application of these exemptions in cases where executive agencies have sought to invoke them has been made by *judicial* intermediaries. Moreover, the agencies have the burden of proving that they are entitled to exemption under the Act, again in contrast to an unreviewable claim of privilege by the Executive to withhold information which it determines to fall within its own definition of "investigatory files and litigation materials." The Executive, for example, often claims that investigatory files are permanently exempt from disclosure even if an investigation and prosecution have been completed—a claim which the courts have rejected with equal frequency.

Independent of these evidentiary privileges and exemptions from the Freedom of Information Act, there are a variety of important constitutional guidelines established by the Supreme Court for the conduct of legislative inquiries, aimed at preventing individual injustices of the sort that executive privilege is designed to combat, at least in the view of some of its advocates. These guidelines set forth limits to avenues of investigatory inquiry, consistent with the requirements of procedural due process and the privilege against self-incrimination. They also establish an absolute bar against inquiries into matters of belief protected by the First Amendment. As applied to the use of investigatory information in congressional hearings, these principles can be summarized as follows:

1. Before airing defamatory, adverse or prejudicial information, a Committee should screen such material in executive session to determine its reliability.

2. An individual whom information tends to prejudice should be properly notified and given an opportunity to appear before the Committee in executive session. He should be allowed to call supporting witnesses if he so requests, and to produce other evidence in order to rebut the prejudicial information. The same requirement of fair notice pertaining to witnesses at public hearings should apply, including a ban on disclosure of the names of witnesses in advance of their appearance.

3. No information discussed at an executive session should be disclosed prior to public session.

4. If adverse testimony is given in public session after the Committee has determined in executive session that it is vital to an investigation, any person about whom such testimony is offered should be afforded an opportunity to:

(a) testify or offer sworn statements in his behalf;

(b) subject a witness offering prejudicial testimony or documents to cross-examination; and

(c) obtain the assistance of the Committee in compelling the attendance of witnesses and the production of documents reasonably necessary to rebut the charges against him.

These constitutional principles, together with the evidentiary and Information Act privileges, assure the protection of the investigatory process and the privacy of persons under investigation. There is no need or warrant to import an "executive privilege," whether or not discretionary, to achieve the same ends.

C. Advice Within the Executive Branch

This brings us to the only aspect of the so-called executive privilege that deserves scrutiny as a possible constitutional privilege based on the separation of powers. That is, in the words of President Eisenhower, the power to withhold "conversations or communications, or any documents or reproductions" that relate to solely internal advice within the Executive Branch. The principal reason for asserting or recognizing such a "privilege" is the undoubted fact that persons will tend to be less candid in exchanging views and making recommendations if they know or fear that their ideas will be subject to later examination and possible public criticism.

This "advice" privilege, as we think it should be called, has been the subject of unconscionably broad interpretation by the Executive. Whether there is or should be a privilege of this kind, and what its scope should be, are questions that not only have raised hackles over Watergate, but had a similar effect during many other celebrated conflicts between the branches of the government, including the Army-McCarthy imbroglio, the Teapot Dome Investigation, and the Aaron Burr treason case.

In our view the privilege is not one that is exclusively "executive." Many of the same considerations, about which we will have more to say later, would apply to attempts to extract data concerning the advice that judicial law clerks or legislative assistants render to their superiors. The principle involved is the necessity to protect the delicate internal decisionmaking process of *each* branch of government.

While it is true that there are reasons of institutional necessity which suggest that in certain limited circumstances the courts should countenance an advice privilege, we reject the idea that there is an "inherent power" in his office that gives the President an unreviewable discretion to withhold factual information from the Congress. In this connection, we take comfort from the Supreme Court's unwillingness in other contexts to accept a claim of inherent constitutional power. As we have seen, it rebutted such a claim in the Steel Seizure Case. Similarly, it rejected the Attorney General's argument that wiretapping could take place without a warrant, denying that "domestic security surveillance may be conducted solely within the discretion of the executive branch;" and, in the case of Adam Clayton Powell, it declined to accept a claim by the Congress, based on similar premises, that would have remitted the seating of members of Congress to the discretion of the legislative branch.

But in our opinion there are reasons why, in closely limited circumstances, the President has an implied constitutional power, the exercise of which is fully reviewable by the courts, to withhold advice that has been given. The principal justification, as already suggested, is that the development of public policy will be harmed if individuals in government cannot rely on the confidentiality of their communicated opinions. Freewheeling debate among colleagues and the presentation of iconoclastic ideas are inhibited if the prospect looms of later cross-examination. A tragic example of such inhibition was the stagnation of

American policy toward China in the wake of the censorious treatment of Old China Hands, such as John Paton Davies, who courageously anticipated American Far Eastern Policy twenty years too soon, and paid dearly for their prescience. To require all advice to be subject to often unfriendly scrutiny would surely dry up many sources of innovation and truth.

There is a second reason for protecting the "advice" that flows from one official to another. It is essentially a recognition of the realities of power and personal vulnerability. As stated by Professor Bishop:

"It is one thing for a cabinet officer to defend a decision which, however just, offends the prejudices of a powerful Congressman and, very probably, a highly vocal section of the public; it is quite another thing for a middle aged, middle-ranking civil servant, who needs his job, to do so.

In many cases, though not all, it will be sufficient if the middle-aged bureaucrat's superior appears and testifies as to government decisions actually made. The Congress will obtain what it seeks, but it will have to do without the pelt of a worker in the vineyard. Protecting the lower ranking individual is especially needed because members of Congress, in their desire to score a point for the folks back home, may run roughshod over the reputation and sensibilities, if not the legal rights, of an honest but uninspired bureaucrat. If this can be avoided, it should be. This is why we conclude that if an implied Constitutional privilege is admitted on practical grounds to allow executive officers to decline to testify, at the direction of the President, it should apply down the line to the lesser and weaker members of the bureaucracy.

The practical necessities of the case, however, may not be thought to justify a constitutional privilege, particularly since there is no express language in the Constitution to support one. In this view the courts would have a more limited, although still important reviewing role. An unsuccessful attempt by the Congress to obtain information from the Executive would not precipitate a constitutional question as to the scope of an "advice privilege," but it could lead to a lawsuit in which the critical question was whether the information sought was germane to a proper congressional inquiry. Courts might tend to shy from limiting Congress under such a vague standard. But because there would be situations in which the Congress reasonably needed to know what action or decisions the Executive took, but not what advice it acted on, there would still be a live question for judicial determination.

Under either formulation, the issue would remain what sort of protection does the Executive require? Whom shall it cover, and what types of information? Who can invoke it, and by what procedures?

We shall now attempt, not without apprehension, to block out a workable and coherent set of principles answering these questions.

1. No witness summoned by a Congressional committee may refuse to appear on the ground that he intends to invoke the "advice privilege" as to all or some of the questions that may be asked.

It has been suggested that certain officers in the executive branch—notably those who are White House aides to the President—may decline altogether to appear. This position has been taken recently not only by President Nixon but by a major congressional figure, Senate majority leader Mike Mansfield, who has stated:

"... I believe any President is entitled to a few intimate advisors on the basis of absolute confidentiality who are not subject to Senate confirmation. The Senate, in my judgment, should respect that confidentiality at least while the advisors remain in the close counseling relationship with the President."

This is a plausible view, and is consistent with the conception, which no doubt is the reality, of an overworked Chief Executive turning to a trusted assistant for absolutely private advice at moments of tension. Such was the relationship, for example, between President Wilson and Colonel House, and FDR and Harry Hopkins. The difficulty is that we are no longer in an era when close personal advisors act purely in a counseling capacity. Fully apart from the individuals who occupy dual positions of cabinet members and advisors to the President, it is plain that the chief White House aides are action officers as well as advisors. This is certainly true about Messrs. Ehrlichman, Haldeman and Kissinger, and from what one reads in the press was also true about the Counsel to the President, Mr. Dean. It was undoubtedly also true about Messrs. Bundy, Callahan, Moyers and Rostow under President Johnson, and about the principal aides to President Kennedy. There may be isolated exceptions, but because of the pattern in recent administrations, nobody should be exempt from appearing.

Accordingly, if an employee of the executive branch is directed by a superior not to testify, he should make himself available to explain the reasons for the refusal. Congress is entitled at least to this. Any other rule—and we fear that it is the rule by which we now live—opens the door wide to unjustified and even arbitrary assertions of privilege, and to the denial to the legislative branch of information it rightfully seeks in order to carry out its constitutional responsibilities.

2. (a) The "advice privilege" may be claimed on behalf of a witness summoned by a Congressional committee only at the direction of the President personally.

(b) The privilege may be asserted only with respect to questions concerning recommendations, advice and suggestions passed on to members of the executive branch for consideration in the formulation of policy.

(c) A witness may not decline to answer questions concerning what has been done, as distinct from what has been advised. Whatever the title of an individual, and whether or not he is called an "advisor," he should be accountable for actions that he took in the name of the government and decisions that he made leading to action on the parts of others.

(d) A witness may not decline to answer questions about facts that he acquired while acting in an official capacity.

The separation of "fact" from "advice," while sometimes difficult, is not impossible. Indeed, executive departments are often required by the courts to make this separation in order to comply with requests for documents under the Freedom of Information Act and other litigation. Without the separation an advice privilege invites abuse. As one witness pointed out in the 1971 Senate hearings on executive privilege, the protection of "advice" is potentially "a most mischievous privilege."

"Virtually every scrap written in the executive branch can, if desired, be labeled an internal working paper. Rarely are matters neatly labeled 'facts,' 'opinions,' or 'advice.' It can be used as readily to shield opinion corrupted by graft and disloyalty as to protect candor and honest judgment. And it can be used as a 'back door' device for withholding state secrets and investigative reports from Congress."

(c) This quotation also suggests why Congress may require answers to questions about actions or advice by executive officials which it has probable cause to believe constitute criminal wrongdoing, such as the Watergate events and attempted cover-up. In such situations, of course, individuals summoned before Congress are entitled to exercise their constitutional rights, including, for example, the privilege against self-incrimination.

3. (a) *Documents* could be withheld from Congress or a committee of Congress only on the signature of the President, or someone authorized to act on his behalf.

(b) The privilege should not extend to entire documents but only to those portions of documents which meet the criteria we have set out to justify an exercise of the "advice privilege." The Supreme Court recently declined to apply this discriminatory rule with regard to an executive claim of secrecy because of national security considerations. But the case in which it did this is readily distinguishable since it involved an attempt to retrieve data under the Freedom of Information Act, which presents no constitutional claim. On the other hand, in the Pentagon Papers case, where a constitutional claim against prior restraints was presented, the Supreme Court held that the First Amendment interests at stake were of such paramount importance that it declined to excise any portions of the documents. As we have stated above, it would have been proper for the President to have ordered purely advisory communications among the Pentagon papers to be withheld from Congress if he had complied, as he should have, with the Senate Foreign Relations Committee's earlier request for the documents in December 1969.

Executive privilege is inconsistent with constitutional principles underlying the investigative power of Congress and the judicial reviewing function of the Supreme Court. The executive branch is therefore on weak ground in asserting that an entire document may be withheld solely because a portion of a document contains "advice." Of course, if facts within the personal knowledge of a witness, or information relating to decisions that a witness personally made or implemented, are "inextricably intertwined with policy-making processes," secrecy should prevail. But if the separation can be made, Congress is entitled to the information not protected by executive privilege.

VI. JUSTICIABILITY AND ENFORCEMENT

No claim of executive privilege has ever been presented for judicial resolution, and Justice Stewart recently stated informally that he doubted it ever would be. The issue, however, is destined to reappear with increasing frequency, particularly when the executive and legislative branches are controlled by opposing political parties, and resolution through accommodation is least likely. Furthermore, compromise will never resolve the basic dispute. It is appropriate, therefore, to consider the context in which the issue of executive privilege might arise in the courts, the problems of jurisdiction and justiciability that it would encounter, and the ways in which a court might enforce a decision on the merits.

A threshold question is how Congress itself might make a determination to submit the dispute to the courts. Not all congressional demands for information are expressive of the will of Congress, many being pressed by individual members for private political reasons. To ensure that the contested information is sought pursuant to a formal legislative inquiry, therefore, it is suggested that a refusal by the Executive to comply with a request for information shall not be submitted for judicial review without the support of a majority of the members of the congressional committee from which the request came—a formula which could be embodied in a statute. Since a committee's request could be overruled by the full body, a more certain expression of congressional will would be a resolution by the relevant legislative branch to obtain the information sought through compulsory process or judicial review.

Once the congressional intent to submit a claim of executive privilege to the courts had been expressed, there are several ways in which a case might be precipitated. A clear case or controversy would be created by a decision of Congress to cite an executive officer for contempt for failing to comply with a subpoena served upon him pursuant to the statutory power of Congress to subpoena witnesses and documents. Theoretically, the only issues that would require resolution in such a proceeding would be whether the contested information was reasonably related to a proper legislative function, and, if so, whether the committee seeking the information had acted within its jurisdiction in issuing the subpoena. In practice, however, the dramatic potential of this method of resolving the question has never been realized: Congress has never expressed the will to punish executive officers who disregard its subpoenas, perhaps because it has never seemed likely that the appropriate United States Attorney, to whom Congress would have to certify the case, would present the contempt to a grand jury for prosecution.

An even more dramatic method of bringing the issue to a head would be for Congress to punish the contempt on its own initiative, as one commentator put, "by the simple and forthright process of causing the Sergeant at Arms to seize the offender and clap him into the common jail of the District of Columbia or the guardroom of the Capitol Police." The prisoner's ensuing petition for a writ of habeas corpus would then present an unavoidable occasion for the courts to decide whether the Executive had the authority to withhold the information which precipitated the dispute. If Congress were upheld the official would remain in custody until he testified or produced the document in question, or until the end of the session of Congress. This procedure assumes, of course, that Congress would adhere to the procedural requirements recently set forth by the Supreme Court in *Father Groppi's* case. Before imposing legislative punishment, Congress would have to give the official due process, which includes at a minimum notice of the charge and an opportunity to appear and defend against it.

Less dramatic and more probable methods of triggering a judicial consideration of executive privilege—for example, in a civil action brought by Congress—are complicated by questions of the standing of Congress or one of its committees to invoke the judicial process in order to compel the production of witnesses or documents by the Executive, and justifiability of a dispute between the political branches of government.

The standing question is less difficult to resolve. While there is no statute conferring jurisdiction upon the federal courts to entertain suits by Congress to compel the production of executive information, Congress could confer upon persons, including itself, the requisite standing to invoke judicial aid in seeking such information. A statute giving Congress standing to secure judicial review of the withholding of information by the Executive would be analogous to the Freedom of Information Act, which gives such standing to "any person" whose request for information is denied.

Nor does Congress lack standing to sue a coordinate branch of the federal government, particularly where it seeks to protect one of its vital functions from impairment and therefore can demonstrate a clear stake in the outcome of the controversy. Unlike a private citizen challenging executive privilege, Congress suffers an injury in fact to an interest within the zone of interests protected by the Constitution each time it is denied information essential to its legislative function.

The political question is somewhat more difficult to resolve. As we have seen the doctrine of executive privilege is the product of repeated and often sharp clashes between the two political branches of government which have so far eluded resolution through the courts. For this reason some would say that the issue is incapable of judicial resolution. But a close examination of the principle that courts will not adjudicate conflicting power claims between the executive and legislative branches does not bear this out.

The political question doctrine as explained by the Supreme Court in its historic reapportionment decision requires that the Federal courts refuse to entertain only those controversies (1) which the Constitution explicitly remits to another branch of government for resolution, (2) where no available standards for decisions are at hand, and (3) when fashioning an appropriate remedy is too difficult. The Constitution is devoid of language remitting the resolution of executive privilege claims to another branch of government. To be sure, the executive branch asserts an "unreviewable discretion" to withhold information from Congress, but as we have seen such an assertion is itself without any explicit or implied foundation in the Constitution. Nor is the power to decide whether Congress has an absolute right to demand information lodged in the legislative branch, even if the courts are confined to determining whether information sought by the legislature from the executive is "germane to a proper legislative inquiry," the test that would be employed if the executive privilege is denied any constitutional stature whatsoever.

One branch, therefore, cannot finally determine the scope of its own power when to do so is to deny a power claimed by the other. Unless the two branches are to engage in a perpetual "trial of strength," which the Supreme Court itself has decried, the power to decide must reside in the courts, which are intended in circumstances such as these, as Justice Holmes put it, to act "as umpire between Congress and the President." If the courts have the power to decide, they do not lack available standards for review. In contrast to the admittedly difficult problem of working out standards for equal representation in the apportionment cases, the standards for deciding the scope of executive privilege can be based on distinctions no more difficult to make than these outlined above (Section V, *supra*), and no more difficult than those which courts are accustomed to make in resolving problems of evidentiary privilege.

Finally, the problem of enforcement, while complicated, cannot serve to bring the political question doctrine into operation when all other indices point toward a judicial resolution of the issue. Unfortunately, the courts could not employ in this context the convenient compromise they use in determining claims of privilege in an evidentiary context—ordering the government to drop its case if it persists in claiming a privilege held to be insufficient. Here the issue is squarely presented; either the Executive must disclose information to Congress or it must not. The enforcement of a legislative contempt citation against an executive officer would not appear to present the courts with more than an ordinary contempt case, although admittedly in an unusual context. The real problem would lie in compelling the contested disclosure. Since a court would not find it difficult to frame the appropriate relief, speculation about the executive's willingness to comply with a judicial order should not enter into consideration of whether the order should issue in the first instance. As the Supreme Court said in the Adam Clayton Powell case, in which it ruled on what the Congress maintained was an "internal matter," "it is an inadmissible suggestion that action might be taken in disregard of a judicial determination."

Furthermore, judicial enforcement of an order resolving an executive privilege dispute would not create the dangers against which the Supreme Court fashioned the political question doctrine: it would not "risk embarrassment abroad or grave disturbance at home," nor would it embroil the courts in "overwhelming party or intraparty contests." For these reasons, we do not believe that the Executive would refuse to comply with a resolution of the issue by the judicial branch.

Nor do we mean to suggest that such a resolution would always be against the asserted interests of the Executive. We do not maintain that an absolute

congressional power to compel information should be substituted for an absolute executive power to withhold it. All "unlimited power" is inherently dangerous, and it is the salutary function of the courts to circumscribe the boundaries of the executive and legislative powers so that neither branch is exalted at the expense of the other. The so-called executive privilege seems pre-eminently an issue to be resolved in this manner.

APRIL 23, 1973.

HON. SAM ERVIN,

Chairman, Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SAM: Relative to the joint hearings on executive privilege and classification which the Subcommittees on Separation of Powers, Administrative Practice and Procedure, and Intergovernmental Relations are conducting, I am offering for possible publication with the April hearings a law review article by me covering the same general fields. The article will appear in the May 1973 issue of the *Virginia Journal of International Law* and is entitled "The President's Constitutional Primacy in Foreign Relations and National Defense." As is indicated by the title, the article discusses the issues of Congressional and public access to governmental information from the particular viewpoint of the President's responsibility to conduct foreign relations and protect the national defense.

I am happy your subcommittee and the others are exploring this field, which is worthy of national debate, and I hope the paper I have written will contribute to the understanding of this subject.

With warm personal regards,

BARRY GOLDWATER.

[From the *Virginia Journal of International Law*, 13 Va. J. Int'l L. 463 (1973)]

THE PRESIDENT'S CONSTITUTIONAL PRIMACY IN FOREIGN RELATIONS AND NATIONAL DEFENSE

(By Barry M. Goldwater)

The Office of the Presidency has come under the most vigorous attack of any period during its history. Many in Congress, prodded by self-proclaimed experts in the news media, have undertaken a monumental effort to restore powers of responsibility which they feel are held by Congress and have been usurped by the Chief Executive. To them, he acts more as an elected Monarch than he does the elected leader of a democratic Republic.

Nowhere has the issue been pressed more vocally and persistently than in the field of national security matters involving the relations of the United States with the outside world. I have written elsewhere of the legislative struggles which opened the 1970's on a note of challenge by Congress against almost every military action taken by President Nixon in the Indochina theater. (1) In particular, I have focused on the attempt by some Members of Congress to gather all the fundamental war powers in the Legislative Branch so that the Executive cannot engage in military hostilities outside the nation without a specific mandate from Congress to do so.

My previous paper attempts to explain why this legislation, referred to as the War Powers Act, (2) would, if adhered to by the President, prevent the United States from undertaking even emergency actions in most situations and would, in any event, unconstitutionally interfere with the President's plenary power to use military force whenever he believes this is necessary to the defense of the United States and its 210 million citizens. (3)

The present article will discuss areas not treated in my earlier paper, but which are directly related to the overall arrangement of national security powers under the Constitution, such as the Executive authority to enter into international agreements other than by the treaty process; the Presidential power to initiate major foreign policy changes through personal advisers around him rather than by reliance upon the Department of State; the use of Executive privilege in refusing to expose certain top staff aides and information to the probings of Congress; and the right of the Executive to classify information in the military and foreign policy fields the exposure of which could become dangerous to the United States or our allies.

These specialized questions are part of the larger issue of whether the President has too much power in the foreign affairs realm. This basic question will be considered from the standpoint of political history. It is in this area where I believe the most intemperate attacks have been made against the Presidency and where the distrust of Executive authority appears to be particularly lacking in any sound historical basis.

I. CURRENT ATTACKS ON PRESIDENTIAL PREROGATIVES

Indicative of the current, incessant attacks on Presidential prerogatives in the conduct of foreign affairs are the statements by critics of the President which I compiled over the last year and released in a Vietnam White Paper three days after the January 23 announcement of a Vietnam ceasefire agreement. (4) The achievement of this agreement (5) by the President after being under the systematic harassment, day and night, by influential television commentators, news writers and Congressmen stands as one of the greatest vindications possible of the concept of Executive guidance over foreign affairs. Through a barrage of pessimistic newspaper and television reports, often accompanied by hundreds of feet of enemy photographs and film, the Office of the President was able to steer the most delicate of negotiations. This skill and steadfastness of purpose succeeded in attaining the American goal of peace with honor and without surrender.

Least the character of the thrust against the Presidency be forgotten with the lapse of time, I believe it is in order to cite a minimal sampling of the opinions which daily criticized the President of the United States. For example, the Washington Post in an editorial published on January 7, only 16 days before the announcement of the peace, stated:

"He has conducted a bombing policy . . . so ruthless and so difficult to fathom politically as to cause millions of Americans to cringe in shame and to wonder at their President's very sanity." (6)

On May 15, 1972, Newsweek Magazine informed its readers "a blockade of Haiphong . . . would almost certainly bring an immediate cancellation of the Nixon visit (to Russia)." (7) History will record that President Nixon was politely received in the Soviet Union a few days thereafter.

Two more responses to Presidential decisions during the American involvement in Indochina include Congressional criticism of the President's decision to mine the major harbors of North Vietnam. The 1968 candidate of the Democratic Party, Senator Hubert H. Humphrey, concluded, "It is fraught with danger and will not contribute to the settlement of the war." (8) The 1972 Democratic candidate, Senator George McGovern, flatly predicted, "If we continue under the Nixon policy, we're not going to see our POW's again." (9)

Without belaboring recent history, it is striking that in nearly every situation the President made the right decisions while receiving the harshest judgment from the media and political pundits. In these circumstances, the successful conclusion of the Vietnam War with the return of American POW's and the movement toward enormous policy changes during the Nixon Administration increase a growing feeling I have about the Founding Father's concept of the foreign affairs discretion of the President.

II. HISTORICAL OVERVIEW OF PRESIDENTIAL POWER

A. Founding Fathers

The Framers of the Constitution invested the Chief Executive with the foreign policy-making powers because of a realization that a single individual with these powers would not be disturbed by politics of the moment. He would look to the long course of history and use his powers more wisely than a Congress which is constantly looking toward the political results. It is my thought that the Founding Fathers understood that Congress divided amongst different minority interests might in some crucial moment of history be loath to give proper direction to a single necessary American course. Thus they found it proper to place the power of external affairs in a single person where the probability of minority weight would be much less likely to have this effect.

The emphasis of the Framers upon planning a government which would be guided by a leader who would act on behalf of a single people with a single purpose appears both in the writings of the Federalist Papers (10) and the debates of the first Congress. For example, in the course of deliberations by the House of Representatives on June 17, 1789, on legislation creating the Department of Foreign Affairs, James Madison referred to the great principle of unity and responsibility in the executive department. (11)

Though the debate centered on the Executive power to remove officers who would be appointed with the consent of the Senate, the concept which prevailed in the debates and votes that day (12) is the same concept which supports the unrestricted authority of the Executive to take the initial role in setting America's course in world matters. A little remembered fact, which was quite apparent then, is that the Senate at that time was considered the chamber of representatives of the state legislatures and very unequal even in that representation. On the other hand, members of the first Congress conceived of the President as "the representative of the entire people . . . the guardian of his country." (13) As Representative Scott pointed out, the President "is elected by the voice of the people of the whole Union; the Senate are the Representatives of the State sovereignties. . . ." (14)

Readings from these formative days of our Constitution would be educational, I believe, for many Members of the Senate who today suggest that the Senate or the Congress should take over from the Executive the decision making power of handling world security matters. If these critics, who believe that the President of the United States cannot handle the powers entrusted to him by the Constitution and that the cumbersome procedures of Congressional decision making are to be preferred, wish to confront the issue squarely, then their only legal alternative is to start the machinery for changing the Constitution.

B. Military Actions

Moreover, I agree with those who assert that the great shift in power between Congress and the Presidency in foreign policy is a myth. (15) For example, as is documented in a study done at my request, there have been at least 199 foreign military actions in which this country participated without a declaration of war, many of which involved extended campaigns and most of which took place outside the Western Hemisphere. (16) The pattern of constitutional usage in the exercise of this war power did not change from the first Administration of President Washington to the 37th Administration of Richard Nixon.

Even President Buchanan, widely quoted (17) as believing that the President had to ask for Congressional authority to employ land and naval forces, acted without any authority from Congress when he ordered a naval force into Cuban waters with directions "to protect all vessels of the United States on the high seas from search or detention by the vessels of war of any other nation." (18) A conflict with Great Britain was avoided only by its abandonment of its claim to the right to visit and search in time of peace. (19)

III. EXECUTIVE AGREEMENTS

A. Ninety-nine Percent Have Congressional Collaboration

The pattern of making international executive agreements follows the same historic course. During the first fifty years of government under the Constitution, the President is believed to have entered into at least 27 international agreements without obtaining the consent of the Senate under the treaty process. This figure increased to 238 executive agreements in the second half century after the Constitution came into force. (20) During the third fifty year period, 917 executive agreements were concluded (21) and more recently in the period from 1946 to April of 1972, 5,589 international agreements other than treaties were made by the President. (22) More executive agreements have been made than treaties in every period of our history except the first fifty years. (23)

It is significant that the first known use of executive agreement occurred as early as the second Congress. It recognized the existence of international agreements other than the treaty by legislating that the Postmaster General may make agreements with the Postmasters in any foreign country for the development of international communication through the postal service. (24)

This early agreement is typical of the vast bulk of nontreaty agreements which have been reached in recent years. Contrary to the emotional rhetoric of Presidential critics, 99 percent of executive agreements in force for the United States as of April, 1972, were either previously or subsequently authorized by statute. (25) Over 1,000 of the present executive agreements deal with the subject of surplus agricultural commodities, pursuant to Federal statute. (26) The Department of Agriculture has also participated in several agreements with foreign countries for the control and eradication of foot-and-mouth disease of animals and for the sale of certain foods for use in school lunch programs of other countries. (27)

The Federal Communications Commission, acting pursuant to a 1964 law which I authored, (28) has participated in the conclusion of 45 executive agreements between the United States and other countries. These relate to the reciprocal granting of authorizations to permit licensed amateur radio operators of either country to operate their ham radio stations in the other country. (29) Another group of at least 38 executive agreements were concluded for the establishment of satellite tracking and data stations in foreign countries under authority resting in the National Aeronautics and Space Act of 1958. (30)

The list of executive agreements also includes customs conventions, (31) agreements for the avoidance of double-taxation, (32) private investment guarantee agreements, (33) and cooperative weather programs, (34) among a great many normal subjects of daily contact between modern day peoples and nations. (35)

Even the overwhelming percentage of agreements participated in by the much maligned Department of Defense involve programs expressly authorized by Congress. Pursuant to the Foreign Assistance Act of 1961 (36) and the Foreign Military Sales Act, (37) bilateral executive agreements have been entered into with over 40 countries setting forth in general terms the conditions under which military assistance will be provided. (38) In the implementation of these basic agreements, thousands of individual executive agreements have been concluded pursuant to the same general grants of authority by the Congress. Foreign military sales contracts alone total some 3300 annually. (39)

According to Fred Buzhardt, General Counsel of the Department of Defense, at least 60 percent of the executive agreements of interest to his department are in implementation of foreign aid legislation. (40) The next largest categories are those concerning United States rights to construct, operate and maintain military facilities and installations overseas. These, in the main part, may properly be considered to have been specifically provided for in the annual Military Construction Authorization and Appropriation Acts. (41)

There is no justification for the cries of horror from Congress about the alleged arrogance of a President run wild with the powers allotted to the Senate or Congress. Of the 5,590 executive agreements in effect on April 1, 1972, only 64, a minute fraction can be classified as having been concluded by the President on the basis of his constitutional authority alone. (42) Congress has put its legislative stamp of approval on 5,526 of these agreements, the Senate itself having thereby concurred in the principle that a two-thirds vote by the Senate is not required to enter into entanglements with foreign countries.

B. Troop Deployments and Political Commitments

In reality, the current challenge from the legislature does not stem out of a basic constitutional difference with the Executive for Congress has conceded this issue through its own legislative delegations of authority. The concern is rather about the policy of a Chief Executive who appears to be moving American military men and material around the globe in ways that run the risk of an attack on our troops stationed in another country or that convey a commitment to a foreign country that the United States will come to its defense if it is attacked. (43)

Here, the Department of State protests vigorously that no such executive agreements exist. (44) The very small number of mutual defense agreements with foreign nations that are in a form other than a treaty include language that takes away from the bindingness of any obligation. (45) These three agreements, which involve Turkey, Iran, and Pakistan, state that the United States, in accordance with the Constitution, will take such action "as may be mutually agreed upon." (46) This is construed by our Government to mean that the undertaking is merely to consult the other government when requested to do so on appropriate action which the United States might be prepared to take in accordance with the Constitution. This in turn is construed by our Government to allow at the time consideration of what we are going to do. It does not promise to come to the defense of another country. (47).

The Department of State apparently concedes the constitutional principle that "agreements which involve a basic political commitment, such as an undertaking to come to the defense of another country if it is attacked, should be cast in the form of a treaty in the constitutional sense." (48) John B. Stevenson, Legal Adviser to the Department of State, admitted as much before Senator Ervin's Subcommittee on Separation of Powers in May of 1972. He added:

"Such agreements establish basic foreign policy commitments to which our overall defense and security strategies are keyed, and I believe that the framers of the Constitution clearly intended that such fundamental agreements should be subject to the special safeguards of the treaty clause." (49).

The basic disagreements between the Department of State and some Members of Congress occurs over the question of whether or not the mere deployment abroad of United States forces is a major foreign policy action which affects the country's destiny and thereby is the kind of commitment which involves the treaty powers of the Senate. There is a growing feeling in Congress, reflected by the advocates of war powers legislation as well as critics of executive agreements, that the deployment of forces itself, particularly in areas of actual or potential hostilities, should be carried out only through the treaty process. (50).

The Department of State responds by arguing that there are no agreements with foreign governments that do necessarily create commitments by the United States. (51) Agreements permitting the United States to use facilities abroad are considered in this view to secure for the United States an "option" to use the facilities. (52)

My own position on the constitutional issue is in disagreement with both viewpoints. I disagree with those in Congress who contend a treaty is required in order to station United States troops on foreign soil, but I also believe the Executive's spokesmen have conceded too much in their attempts to draw a narrow technical line between formal commitments and "options." When American forces are sent into waters or lands where they cannot avoid coming under attack should the host country be invaded or attacked, our forces have little option left to protect themselves whatever our policy may be toward the country suffering the attack. It is my view that we go into these situations with our eyes open and that the Presidents possess full authority to do what they have been doing so long as a President believes the action is required for the national defense and he has the consent of the foreign country involved. (53)

For example, on August 7, 1946, the Soviet Government demanded that Turkey allow it to participate in the defense of the Straits, which meant the occupation of Turkey. On August 15, President Truman obtained counsel from Secretary of State Acheson, Secretary of Navy Forrestal, Under Secretary of War Royall, and the Chiefs of Staff. When a recommendation was laid before the President urging that a powerful naval force, including the newly commissioned supercarrier *Franklin D. Roosevelt*, be sent to Istanbul. General Eisenhower, then Chief of Staff of the Army, asked whether it was sufficiently clear that the course recommended could lead to war. Secretary Acheson reports that at this moment the President took from the drawer of his desk a large map of the Middle East and Eastern Mediterranean and asked the group to gather around behind him. The President then gave a brief lecture on the strategic importance of the area and the extent to which the United States must be prepared to risk to keep it free from Soviet domination. When he finished, writes Mr. Acheson, none doubted the President understood fully all the implications of the recommendations for the defense of the Straits. (54).

In his brief manuscript which he dictated in the fall of 1967 on the basis of personal diaries and recollections, Robert Kennedy related the top level deliberations of the Kennedy Administration in those thirteen days of October, 1962, when the decisionmaking of President John Kennedy "brought the world to the abyss of nuclear destruction and the end of mankind." (55) With missiles being placed in Cuba having an atomic warhead potential of one-half the ICBM capacity of the Soviet Union and with indications that these missiles were being directed at American cities where 80 million Americans would be dead within a few minutes of their being fired, President Kennedy felt compelled to take defensive action without consulting Congress. (56) Before the President met with any Members of Congress and informed them for the first time of the crisis, he had made his decision in favor of the blockade of waters around Cuba; and, without any specific legislative action or consultation, he put six Army divisions on alert, deployed 180 ships into the Caribbean, and disbursed the Strategic Air Command to civilian landing fields around the country in order to lessen its vulnerability in case of attack. At the same time the B-52 bomber force was ordered into the air fully loaded with atomic weapons. (57)

The result of such decisive action was the October 27, 1962, agreement by the Soviet Chairman, Mr. Khrushchev, to dismantle and withdraw the missiles from Cuba. (58) The United States apparently closed the book on the Cuban crisis about December 6 of that year, by which date the United States had counted at least 42 medium-range missiles being removed from Cuba on Soviet ships and verified as well that 42 Soviet jet bombers were being transported home from Cuba. (59)

C. The President's Constitutional Independence

These are the kinds of situations in which I believe the Founding Fathers have empowered the President to mobilize, deploy, and even direct into action, the military forces which Congress has provided for this country by its various authorization and appropriation statutes. In other words, I believe the survival of this nation is a concern of the Executive which he can pursue by using whatever forces Congress has supplied, in whatever ways, outside the territory of the United States, that he believes is necessary in the defense of America and its freedoms.

His power to do this is vested in him as Commander-in-Chief, as the Executive power of a sovereign nation, as the executor of the laws, treaties, and Constitution of the United States, and as the organ of this nation in its foreign affairs. The many authorities which support my view of Presidential power are cited elsewhere by me and I shall incorporate these by reference for purposes of this article. (60)

In my opinion, the Constitution grants Congress considerable powers of influence over the course of foreign relations, (61) but it does not allow Congress to legislate in advance, even by general appropriation riders, policy directives which would restrict the President from entering into agreements by his own authority for the location of American troops outside the country. (62) Congress can reduce the size of the armed forces and, after reviewing the world situation, can appropriate a reduced defense budget in line with its own view of what the risks to America are and what our commitments should be. If the American public supports the movement of foreign policy towards a new direction, I have a faith that our political system will function effectively and enable such a change in direction to occur.

To me, Vietnam stands as a visible example of how the Constitutional arrangement of powers worked to bring about an end to the cycle of escalation in the deployment of more and more manpower to Indochina and even to achieve the complete termination of the American fighting role there. When Congress and the majority of the American people stopped backing the conduct of a major land war in Southeast Asia, it was ended.

My own position, as a layman, is similar to the generalized *dicta* expressed by Justice Stewart, joined by Justice White, concurring in the "Pentagon Papers Case":

"In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations . . . For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government." (63)

D. The Bricker Amendment Revisited

If my position today appears to conflict with my vote (64) in favor of the Bricker Amendment of the 1950's, (65) I would merely state that Senator Bricker's proposal was in the form of a Constitutional Amendment and that it involved certain crucial State's rights questions absent from the contemporary debate. The Bricker Amendment fully recognized the need for changing the Constitution in order to touch this matter and it in no way supports the position of present day Members of Congress who wish to alter foreign affairs powers through simple legislation.

It should also be remembered that the Bricker Amendment contained an important provision which would have provided that no executive agreement or *treaty* should be made "respecting the rights and freedoms of citizens of the United States recognized in this Constitution, the character and form of government prescribed by the Constitution and laws of the United States, matters which involve no substantial mutuality of interest as between the United States and other sovereign states, or any other matters essentially within the domestic jurisdiction of the United States." (66)

These grave questions of local, domestic affairs which were a focal-point of the Bricker Amendment debates have been removed from consideration today by virtue of a Supreme Court decision which was later handed down. It is now firmly established by the High Court that specific rights and guarantees secured by other provisions of the Constitution cannot be altered under the guise of the treaty power. (67)

IV. PRESIDENTIAL RELIANCE ON NATIONAL SECURITY ADVISORS

The principle of responsibility in a single officer of the Government for the conduct of foreign affairs, which is necessary to the effective safeguarding of the national security, is also a basis of Presidential authority to choose and rely upon top staff advisors around him. This principle is buttressed by the separation of powers, which is natural from the arrangement of government into distinct branches. Unless it is believed Congress can redefine powers allotted by the Constitution, the President, as head of an independent department of Government, must be able to act in the external realm with the advice and participation of whomever he believes is compatible with his own temperament and can best provide the help he wants.

Again, in this area, there is a sensitivity in Congress, almost the expression of an inferiority complex, that the practice of assistance from special Presidential advisors on foreign affairs excludes Congress from the policy-making process. Many tears are shed about the alleged decline of prestige of the Secretary and Department of State, but the main objection is to a whole new super-bureau allegedly separate from and inferior to the regular Cabinet departments and shielded from Congress and the people behind a barricade of executive privilege. (68)

What this reflects is not merely the wish of Congress to play a role in the eventual course of foreign affairs but a longing for control over the formulation of policy at its inception. The challengers in Congress are not simply asking to be consulted before any foreign policy moves are made; they want to have a veto over the trends of foreign affairs in its smallest details. This plainly was not the design of the Founding Fathers when they divided the powers of Government among three distinct departments. There is no Supreme Court decision saying that Congress has the dominant role in the making and conduct of foreign affairs, but there are 186 years of experience under the Constitution, (69) and earlier traditional known to the framers of the kinds of powers usually vested in the heads-of-states, (70) which support Presidential discretion in this field. (71)

The truth is that neither the Constitution, nor any law which Congress may pass, can bind the President "to monogamous cohabitation with the Secretary and Department of State in the conduct of foreign affairs." (72) President Wilson relied on his unofficial ambassador-at-large, Colonel Edward M. House, in the management of foreign affairs, and President Franklin D. Roosevelt controlled his foreign policy with the help of Harry Hopkins at his side. (73) Reliance on the relatively new organization of the National Security Council (74) has its origins in the role of the Council and its Operations Coordinating Board under President Eisenhower. The influence exercised by the Council's Chairman can be traced to the successive appointments of McGeorge Bundy, Walt Rostow and Henry Kissinger as the Special Assistants for National Security Affairs to the three most current Presidents. The system came into being long before President Nixon. (75)

It is true Mr. Kissinger has a staff of some 54 substantive officers, (76) but there is nothing sinister or improper in this. There have been enormous policy changes in movement during the Nixon Administration and the need has grown more than ever for a President to have competent top advisors on whom he can count for aid in implementing these basic changes. I believe a small group of people, working closely with the President, is a necessity in helping any Administration develop and implement such new departures as have occurred in this one. The transformation of United States relations with its allies to one in which our country will carry less of the burden, the openings to Communist China and the shift to a less barren relationship with the Soviet Union have all come about with such a system.

In my opinion the Constitution allows the President to put the advisory function wherever he wants and believes it would be carried out most faithfully, loyally, and effectively. If his close advisors will not jump on a string and appear before every Congressional Committee which seeks to probe the inner-most workings and discussions of the President's councils, so be it.

The President will come before the people every four years and if in their judgment, he has misguided the nation, he can be replaced. In the meantime, he must get along well enough with Congress at least to obtain the money he needs to administer the programs, domestic and foreign, which he advocates. If he attempts to take any really disastrous course, he can be impeached. (77)

The principle of responsibility in the Chief Executive for the officers appointed under him was resolved in favor of the President by the first Congress in two

votes taken during the debates on creation of the Department of Foreign Affairs, which upheld the President's power of removal as an inference of the Constitution. (78) The thrust of the winning side in the debate was that the Constitution has separated the powers of government and it would be improper for Congress to combine and mingle them together by allowing Congress to continue in office an individual in the high ranks of the Executive Department who was not wanted by the President. (79)

This basic concept of independent responsibility in the President was later upheld by the Supreme Court. In *Myers v. United States*, (80) the High Court held that the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate and that Congress may not condition the President's removal power on the concurrence of the Senate. I believe this same independence in relation to his important officers extends to a total discretion of the President in choosing which officer he shall have as his primary foreign policy advisor.

V. ASSERTION OF EXECUTIVE PRIVILEGE

Senatorial rhetoric notwithstanding, the Executive generally operates in a spirit of cooperation with Congress whereby most documents and testimony sought are forthcoming from the President. Even a leading critic of executive privilege, Professor Raoul Berger, who has written an exhaustive two-part study of the subject, admits that "over the years the vast bulk of Congressional requests for information have met with compliance . . ." (81)

Akin to the executive agreement experience, when the inquiry into the use of executive privilege is limited to instances of asserted Executive authority, it turns out that there are not many examples to show. For example, a recent Library of Congress study reveals that between 1961 and 1972, President Kennedy invoked the executive privilege 13 times and President Johnson 3 times, while President Nixon, the alleged all-time usurper, invoked it on only 11 occasions. (82) Actually President Nixon has invoked executive privilege but three times in response to a Congressional request for information, as distinguished from requests for Congressional appearances by officers of the Executive Branch and members of his personal staff. (83)

One example when the privilege was invoked in writing was the effort by the Senate Foreign Relations Committee to obtain access to the five year spending plan for military assistance. In a memorandum dated August 30, 1971, President Nixon invoked executive privilege not to make available the basic planning data and various internal staff papers requested by the Committee on the ground that this "would impair the orderly function of the Executive Branch of the Government." (84) The President explained that these papers, insofar as they deal with future years, do not reflect any approved program of his Administration but reflect only tentative intermediate staff level thinking. He expressed his concern "that unless privacy or preliminary exchange of views between personnel of the Executive Branch can be maintained, the full frank and healthy expression of opinion which is essential for the successful administration of Government would be muted." (85) Surely there is wisdom in what the President writes, and surely under our Constitution he may exercise the privilege of protecting this type of internal working data. (86)

An example of the informal use of the privilege is when Secretary Rogers and Presidential Assistant Kissinger declined to appear before the Senate Foreign Relations Committee on January 2, 1973, to discuss Indochina events. (87) These officials did not appear because it would have been disruptive to the Administration's delicate, ongoing negotiations with the North Vietnamese to end the war, and, in light of recent history, it appears they were fully justified in using this reasoning. The claims to the contrary by some in Congress made absolutely no sense whatsoever unless these people assumed that the President and Dr. Kissinger were deliberately seeking a prolongation of the war. These criticisms likely served no other result than to interfere with this country's chances of arranging a settlement sooner by encouraging the enemy to think he might receive from Congress on a silver platter what he could not win at the negotiating table.

What is more important in the long course of history, the successful conclusion of an important foreign policy goal of all the people or the technical submission of an Executive Department official to the formal questioning of a small group of Members of Congress? This is not to say that officers of the Executive Branch should never appear before Congress because there were four times in 1972 when Secretary of State Rogers went before the Senate Committee; (88)

and it is not to say that Mr. Kissinger never meets with Senate Committee Members because he has met several times with them in private homes or offices.

Dr. Kissinger meets with the Chairman of the Senate Foreign Relations and the full Committee on an average of every other month when Congress is in session. He has met with them in Senator Fulbright's home and in Senator Fulbright's Senate office as well. He will answer any questions on a classified basis. Though no transcript may be kept of these meetings, Senators are allowed to take notes. In addition, Dr. Kissinger has met individually with every Member of the Senate Committee and he keeps open a standing offer inviting every Member of the Senate to be briefed fully on a classified basis. This would appear to more than meet the suggestion of critics, such as Professor Berger, who concede that the underlying purpose of access, which is to obtain information, would be satisfied by transmitting information of great gravity to a select few designated by the legislature. (89)

Notwithstanding the very limited usage of executive privilege, the Senate Democratic Policy Committee voted almost unanimously on January 18, 1973, to resolve that all proposed Executive Branch witnesses must appear before Senate Committees and must answer all questions propounded by the Committees. Even when the President pleads in writing that he has requested the witness to refuse to answer specific questions dealing with a specific matter, the Senate Democrats resolved that it shall be a question for the Committee to decide as to whether or not the plea of executive privilege is well taken. If the Committee rejects the President's reasons, it can cite the witness for contempt. (90)

In other actions against the use of executive privilege, bills have been introduced in the Senate to limit the assertion of the privilege. (91) It is said the precedent for this legislation dates back to the Treasury Act of 1789, (92) which is argued to be a practical construction of the legislative power by the first Congress. (93) This statute included a provision stating that it shall be the duty of the Secretary of the Treasury to "give information to either branch of the legislature in person or in writing (as he may be required) . . ." (94)

The debate on this measure, however, makes it quite clear the provision was not hoisted on the Executive by Congress but rather was drafted by Alexander Hamilton himself who hoped that he could thereby provide advice almost at will to Congress. (95) The debates therefore centered over the objections of many in Congress that this provision might allow the Secretary to "have an undue influence in the House." (96) The bill was certainly not conceived as imposing a requirement of Congress on the Secretary, but rather as one which might make it a matter of right for the Secretary to intrude his advice on Congress. It would certainly be a false reading of history to cite a provision, which was considered at the time as an interference of an Executive officer in the business of legislation, as a precedent for limiting the Executive. (97)

It is my belief that the Executive has a constitutional right to withhold information from the public and even from Members of Congress in certain **hard-core situations**, including instances where he believes the national security is at stake, where the confidentiality of internal deliberative processes must be preserved, where the enforcement of the criminal laws is involved, or where an individual's privacy must be protected against the release of confidential security files. (98) Executive privilege has no place, however, in cases where the personal wrongdoing on the part of an Executive official or staffer in the subject and I am for the full and open disclosure of all pertinent facts in these situations, allowing only for protection of sensitive national defense-type information which has nothing to do with the charge of wrongdoing.

President Nixon issued a special statement on executive privilege on March 12, 1973, in which he declared that without the protection of this doctrine "our military security, our relations with other countries, our law enforcement procedures and many other aspects of the national interest could be significantly damaged and the decision-making process of the executive branch could be impaired." (99) While reasserting his general policy of providing information to the Congress to the fullest extent possible, President Nixon asked Congress to recognize that requests for executive branch testimony by members of his staff present a different situation and raise different considerations. What is at stake here is "the integrity of the decision-making process at the very highest levels of our Government." (100)

One point that any honest observer will admit is that the question of whether or not the President or any person delegated by him may withhold information from Congress has not been squarely adjudicated by the Supreme Court. (101)

A very few cases may exist concerning the production of evidence to private parties in judicial proceedings to which the Government is a party, but in this kind of litigation the Government is never absolutely required to make disclosure. It can avoid that result by dropping the prosecution or suit or settling the plaintiff's claim. These were the conclusions of the Library of Congress in a legal memorandum prepared for a recent Senate hearing on executive privilege and I believe they are widely shared by commentators in the field. (102)

Accordingly, I believe Congress lacks any authoritative decision supporting the position of the Democratic Policy Committee in its threat to compel by the contempt power the production of documents or testimony on the part of officials of the Executive Branch; and, in my opinion, such a threat is a reckless action, the nature of which could freeze the government's operations by creating a divisive Constitutional confrontation between the President and Congress. On the basis of what I believe to be logical interpretations of the Constitution, and relying on historical precedents, (103) I am persuaded that the exercise of executive privilege in matters of national security and foreign policy, confidential conversations and papers by persons who are in direct relationship with the President, personal security files, and court litigation preparation are firmly rooted on sound constitutional ground. (104)

VI. PRESIDENTIAL CLASSIFICATION OF INFORMATION

The field of executive privilege is a logical introduction to the closely related field of the President's authority to keep secret information which in his judgment is necessary to protect the national defense or to advance foreign policy. I firmly believe and always have that there are areas within the operations of government, particularly in the sphere of foreign and military policy, that must be classified so that the information does not become public at times that would be dangerous to the United States. At the same time I believe that these items should be declassified as rapidly as possible, perhaps using a system of automatic declassification in a period as short as 12 years. Furthermore, I disagree on the ability of almost anyone in the State Department, the White House or the Pentagon to stamp top secret. This should be decided by someone close to the Joint Chiefs of Staff or to the President himself.

President Nixon moved in this direction in 1972 when he signed an Executive Order (105) cutting the number of persons with authority to classify national security information by 63 percent. (106) In signing the order, which became effective June 1, 1972, the President said, "We have reversed the burden of proof. For the first time, we are placing that burden—and even the threat of administrative sanction—upon those who wish to preserve the secrecy of documents rather than upon those who wish to declassify them after a reasonable time." (107)

Under the new order, "top secret" papers can become public after ten years and generally will within 30 years. The only exception at ten years will be information furnished in confidence by a foreign government on the understanding it would be kept in confidence, information covered by law, such as codes and intelligence operations, information on a matter "the continuing protection of which is essential to the national security," and information whose disclosure would place a person in immediate jeopardy. (108) But anyone may, after a document is ten years old, ask for a review of the reasons why it is still kept a secret. (109)

All information shall become automatically declassified after thirty years except for a matter which is specifically identified by the head of the Department involved and determined by him personally to require continued protection on the ground it "is essential to the national security" or its "disclosure would place a person in immediate jeopardy." (110)

The new order also created the Interagency Classification Review Committee, which is the first White House level group with overall responsibility for the Government's security classification program. According to the initial progress report of this group, the new order slashed the number of government workers with "top secret" classifying authority to 1,056 officials against 3,634 before the order took effect. In all, 17,883 personnel will be authorized to put a top secret, secret or confidential label on government information compared to 48,814 before. Further reductions are anticipated. (111)

The President's order also eliminated classification authority for several Federal agencies, reducing the number of agencies who can classify papers from 37 to 25. (112) Also, a complete list has been compiled for the first time of the names of

all persons with classification authority. In this way, the President said, "Each official is to be held personally responsible for the propriety of the classification attributed to him." (113)

In a related development, the National Security Council issued directives implementing President Nixon's order by telling each agency to begin reporting by July 1, 1973 all major classified documents produced after December 31, 1972, their subject headings, and when they should become available to the public. This information will be fed into a computerized Data Index System which is expected to give an updated accounting on all new secrecy items stamped after December 31, 1972. (114)

Having expressed my own policy and discussed the latest reforms of the Executive Branch, I turn to the basic constitutional question of the Presidential authority to classify any information at all. As regards the Executive's right to restrict information which he determines must be kept secret from the *public* to protect the national defense or advance foreign policy, the Supreme Court announced early in 1973 that Congress had by law decreed total Executive discretion over such classification. (115) This case, which did not involve any question of a Congressional demand for information, presented no constitutional claims either in respect to the relationship of the President with Congress or with regard to the First Amendment rights of a free press. (116)

On the latter point, the Pentagon Papers case (117) appears to leave open the possibility that the publication of information may in some situations be enjoined (118) and hints broadly that the Government can succeed by criminal prosecution where it cannot by injunction. (119) Congress has provided many penal sanctions, the object of which is the communication or retention of documents or information relating to the national defense. (120) Ironically, the granting of a mistrial and dismissal of the Government's charges against Daniel Ellsberg and Anthony J. Russo, Jr., because of the extraordinary and stupid conduct on the part of certain Government agencies which threatened the defendants' opportunity for a speedy and fair trial, prevented these laws from being directly tested in a modern setting. (121)

As to the need for secrecy from Congress itself in the categories of foreign relations and military affairs, I believe the Constitution admits of a Presidential discretion in the withholding from Congress of a narrow range of information which the President determines is necessary to conduct successfully the nation's foreign relations and national defense. (122) While there is not a Supreme Court decision clearly on point to my knowledge, I believe if it were put to the test, a majority of the present Court would so apply the principle laid down by Justice Stewart and Justice White in the Pentagon Papers case, where they conclude "it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." (123) The rationale of the Justices was that "it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy." (124)

VII. SUMMARY

Given the precedent of *Myers v. United States*, *supra*, I am strongly convinced that those members of Congress who contend that Congress is empowered under the "necessary and proper clause" to define the President's powers over the conduct of military hostilities, (125) the conclusion of international agreements, (126) and the use of executive privilege (127) are dead wrong. It is significant that although the Court was dealing in *Myers* with an express authorization under the Constitution for Congress to establish offices of the United States, it nevertheless held that Congress could not restrict what was an independent power of the President. In the words of Chief Justice Taft, writing for the Court, "the plan of government desired by the framers of the Constitution . . . could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government." (128)

The argument that the Congress can act under the "necessary and proper clause" to restrict the President in his discretion over foreign affairs clearly begs the question of where the framers have deposited these functions. Congress

can aid the President in the exercise of his functions, but it cannot interfere with or limit his discretion in carrying out his separate powers. (129)

That there does and must exist some ultimate area of unshared, independent power of the President in the conduct of foreign affairs and preservation of our national security is the cornerstone on which the survival of our nation rests. I realize there does exist a "virus of disbelief in danger and recoil from meeting it" (130) which seems to lead some intelligent people into a wishful belief that our country can safely cripple its military arm and unilaterally induce a world peace into being. Oddly, it takes a citizen from a totalitarian society to expose the fruits of this kind of policy. Alexander Solzhenitsyn, the Soviet writer who was awarded the 1970 Nobel Prize for literature, included the following remarks in his acceptance speech which was published in the Nobel Foundation's yearbook of 1972:

"The spirit of Munich has by no means retreated into the past: It was not merely a brief episode. I even venture to say that the spirit of Munich prevails in the 20th Century. The timid civilized world has found nothing with which to oppose the onslaught of a sudden revival of barefaced barbarity, other than concessions and smiles. The spirit of Munich is a sickness of the will of successful people; it is the daily condition of those who have given themselves up to the thirst after prosperity at any price, to material well-being as the chief goal of earthly existence. Such people—and there are many in today's world—elect passivity and retreat, just so as their accustomed life might drag on a bit longer, just so as not to step over the threshold of hardship today—and tomorrow you'll see, it will all be all right. (But it will never be a right. The price of cowardice will only be evil. . . .)" (131)

In place of "the spirit of Munich," referred to by Solzhenitsyn, we might substitute "the death wish of dreamers" who think we have no problems in this world and no need for a commitment to our national security. Such an attitude, if it should ever prevail in this nation, could only bring about the degradation of our national reputation and contempt abroad, followed by a disaster such as we encountered with the outbreak of World War II.

I can think of no more fitting words with which to conclude this article than the reflections made by John Quincy Adams in 1836 when he described the duty of a President to strive for peace but always to remember the nature of mankind:

"If there be a duty, binding in chains more adamant than all the rest the conscience of a Chief Magistrate of this Union, it is that of preserving peace with all mankind—peace with the other nations of the earth—peace among the several States of this Union—peace in the hearts and temper of our own people. Yet must a President of the United States never cease to feel that his charge is to maintain the rights, the interests and the honor no less than the peace of his country—nor will he be permitted to forget that peace must be the offspring of two concurring wills. That to seek peace is not always to ensure it. . . . the peace of every nation must depend not alone upon its own will, but upon that concurrently with the will of all others. (132)

FOOTNOTES

1. Goldwater, *The President's Ability to Protect America's Freedoms—the Warmaking Power*, 1971 LAW AND THE SOCIAL ORDER 423–425, 429–433. In the period from 1969 through 1972, Congress took 95 recorded votes on measures designed to curtail U.S. activities in the Indochina War and at least 45 additional non-record votes on similar proposals. 31 CONG. Q. WEEKLY REP. 119–120 (1973).

2. S. 731, S. 2956, S.J. Res. 18, S.J. Res. 59, 92d Cong., 1st Sess. (1971); reintroduced as S. 440, 93d Cong., 1st Sess. (1973).

3. For a discussion of the Constitutional points, see Goldwater, *supra* note 1, at 433–443. For a treatment of the practical issues, see *id.* at notes 79, 165; and my testimony in *Hearings on S. 731, S.J. Res. 18 and S.J. Res. 59, Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess., *War Powers Legislation*, at 347–400 (1971).

4. See text of President Nixon's announcement of the Vietnam peace agreement, 31 CONG. Q. WEEKLY REP. 121 (1973).

5. See text of Vietnam Cease Fire Agreement and Protocols, as made available January 24, 1973, by the White House, 31 CONG. Q. WEEKLY REP. 151–164 (1973).

6. The Wash. Post, Jan. 7, 1973, at B6, col. 1.

7. NEWSWEEK, May 15, 1972, at 22.

8. 30 CONG. Q. WEEKLY REP. 1057 (1972).

9. Buffalo Evening News, June 14, 1972, at § 3, p. 34, col. 1. Contrast this prediction with the concise history headlined by the Star-News of March 29, 1973: "Last 67 POWs Free, Troops Go." The Evening Star-News, Mar. 29, 1973, at 1, cols. 1–8.

10. THE FEDERALIST no. 73, at 409 (rev. ed. 1901) (with special introduction by Goldwin Smith).

11. 1 ANNUALS OF CONGRESS 499 (1789-1790).

12. See generally, *id.* at 456-585.

13. See remarks of Mr. Hartley, *id.* at 581.

14. *Id.* at 533.

15. Remarks of Eugene V. Rostow, YALE LAW REPORT, Fall and Winter of 1971-1972, reprinted at 118 CONG. REC. S. 5263 (daily ed. March 30, 1972).

16. See generally Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53 (1972), Appendix A, as reprinted with supplementary data in *War Powers Hearings Before the Subcommittee on Nat'l. Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. at 328 (1973). There have only been five declared wars, the War of 1812, the War with Mexico, the Spanish-American War, and World Wars I and II.

17 E.g., Appendix A to statement of Leon Freidman, special counsel A.C.L.U., *War Powers Legislation*, *supra* note 3, at 806-807.

18. C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 51 (1921).

19. *Id.*

20. W. McCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 4 (1941).

21. *Id.*

22. Compilation of numbers of treaties and international agreements other than treaties concluded by the United States during the period Jan. 1, 1946, to April 1, 1972, by U.S. Dept. of State, in *Hearing on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. at 416 (1972). (hereinafter *Hearing on S. 3475*).

23. *Id.*; McCCLURE, *supra* note 20, at 4.

24. 1 Stat. 232, 239 (Act of Feb. 20, 1972).

25. U.S. Dept. of State compilation. *Hearings on S. 3475*, *supra* note 22, at 416.

26. Testimony of John R. Stevenson, Legal Adviser, U.S. Dept. of State, *Hearing on S. 3475*, *id.* at 249.

27. "List of executive agreements with foreign states, since World War II, in which the Department of Agriculture has participated," *id.* at 555.

28. Communications Act of 1934, §§ 303(1), 310(a); 47 U.S.C. §§ 303(1), 310(a) (1934).

29. Part (b) of list of communications requirements entered into between the United States and other countries. *Hearing on S. 3475*, *supra* note 22, at 573-575.

30. List of Intergovernmental Executive Agreements in which the NASA has participated, *id.*, at 594, 595.

31. List of executive agreements in which the U.S. Dept. of Treasury has participated in since World War II, Customs, *id.*, at 617.

32. *Id.*, Tax, at 620-622.

33. Chronological list of investment guaranty agreements and Amendments, 1948 to 1972, Overseas Private Investment Corp., *id.*, at 601-604.

34. List of executive agreements in which the National Oceanic and Atmospheric Administration, U.S. Dept. of Commerce, has participated since World War II, part "B. Cooperative Weather Programs," *id.* at 565, 566.

35. See generally replies of U.S. Government Agencies to letter of Senator Sam Ervin, Jr., Chairman, Subcommittee on Separation of Powers, soliciting information on the number of executive agreements entered into, *id.*, at 552-627.

36. 22 U.S.C. §§ 2151 et seq. (1961).

37. 22 U.S.C. §§ 2751 et seq. (1968).

38. Testimony of J. Fred Buzhardt, General Counsel, U.S. Dept. of Defense, *Hearing on S. 3475*, *supra* note 22, at 331.

39. *Id.*

40. *Id.* at 332.

41. *Id.*

42. U.S. Dept. of State compilation, *Hearing on S. 3475*, *supra* note 22, at 416.

43. E.g., testimony of Senator J. W. Fulbright, *Hearing on S. 3475*, *supra* note 22, at 54; testimony of Senator Clifford P. Case, *id.*, at 109.

44. Colloquy between John R. Stevenson, Legal Adviser, U.S. Dept. of State, and Professor Philip B. Kurland, Chief Consultant, Senate Subcommittee on Separation of Powers, *Hearing on S. 3475*, *supra* note 22, at 280, 281.

45. *Id.*, at 280.

46. *Id.*

47. *Id.*

48. Stevenson, *Hearing on S. 3475, supra* note 22, at 256.

49. *Id.*

50. E.g., remarks by Senator Ervin relative to stationing U.S. troops in other countries, *Hearing on S. 3475, supra* note 22, at 267.

51. The State Department Legal Adviser asserts that "even where agreements are involved, they do not necessarily create commitments by the United States." Stevenson, *Hearing on S. 3475, supra* note 22, at 257.

52. "Agreements permitting the United States to use facilities abroad do not in any sense require deployment of U.S. forces. . . . The agreements simply constitute action by the President to secure for the United States an 'option' to use facilities." Stevenson, *id.*

This interpretation is also accepted by the Department of Defense, whose General Counsel testified that agreements concerning our rights to construct, operate and maintain military facilities and installations overseas "provide only an option to the U.S. Government, and the exercise of the option is dependent upon both authorizations and appropriations from the Congress." Buzhardt, *id.*, at 333.

53. The legal arguments in support of the President's power to make executive agreements in every consequential respect equivalent to a treaty are set forth in a general constitutional discussion by Assistant Attorney General Erickson, *Hearing on S. 3475, supra* note 22, at 307-313, and in a voluminous study by Professor Myres McDougal and Asher Lans, written twenty-eight years ago but still eminently useful. McDougal-Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1-2), 54 *Yale L.J.* 181, 534 (1945). A recent article which concludes the Constitution provides ample authority for the executive agreement is Hopson, *The Executive Agreement in United States Practice*, 12 *AIR FORCE JAG L. REV.* 252 (1970).

Professor McDouglas retains his earlier position. He writes :

"It seems to me that our usage during the past twenty-five years strongly confirms that the President's independent powers over foreign affairs include a competence to make important agreements of substantial duration. Certainly, our experience as a nation in an increasingly dangerous world indicates that it is indispensable that he have such a competence."

Letter from Myers McDougal to Barry Goldwater, Jan. 12, 1973 (unpublished letter in author's personal files).

An early treatise by John Bassett Moore setting forth numerous examples of purely executive agreements on a wide range of topics, having far-reaching importance, is of continued legal significance. This paper was cited approvingly by the Supreme Court as portraying "the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs." Moore, *Treaties and Executive Agreements*, 20 *Pol. Sc. A.* 385 (1905) cited in *United States v. Pink*, 315 U.S. 203, at 230 (1952).

54. D. ACHESON, *PRESENT AT THE CREATION* 195, 196 (1969).

55. R. KENNEDY, *THIRTEEN DAYS* 23 (1969).

56. *Id.*, at 35, 36.

57. *Id.*, at 52. President Kennedy did meet with Congressional leaders, but only after he had taken these actions and decided upon the naval blockade. Many in Congress advised more forceful action than he was prepared to take. *Id.*, at 53, 54.

58. *Id.*, at 110.

59. Library of Congress, Legislative Reference Service, *A Selected Chronology on Cuba, October 23, 1962-January 1, 1963*, at 1-13.

60. Goldwater, *supra* note 1, at 435-443. Also, see Emerson, *War Powers: An Invasion of Presidential Prerogative*, 58 *A.B.A.J.* 809 (August 1972).

61. Goldwater, *id.*, at 445-447.

62. On March 15, 1973, the Senate Democratic Policy Committee voted without dissent that U.S. troops stationed overseas be reduced by two-thirds. 119 *CONG. REC.* S4830 (daily ed. March 15, 1973), S 5013 (daily ed. March 19, 1973).

This is exactly the kind of policy directives which I believe Congress cannot legislate. Acting as Commander-in-Chief, which confers upon him supreme command and direction over the Armed Forces, the President possesses full constitutional authority to direct the movement of the forces. He can send them anywhere, with the consent of the host countries, necessary to U.S. foreign policy objectives and U.S. defense. J. POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* 472 (1870).

Moreover, the Framers never meant for Congress to have authority to lay down automatic restrictions governing the Executive's troop deployment decisions in advance of the actual setting in which the President might feel compelled to act. This is not the way they planned the Constitution to function. As Hamilton wrote in the *Federalist* No. 23, "The circumstances that endanger the safety of nations are infinite; and for this reasons no constitutional shackles can wisely be imposed on the power to which the care of it is committed."

63. *New York Times Co. v. United States*, 403 U.S. 713, 727, 728 (1971).

64. 100 CONG. REC. 2374 (February 26, 1954).

65. S.J. Res. 1, 83d Cong., 1st Sess. (1953).

66. *Id.*, § 3.

67. *Reid v. Covert*, 354 U.S. 1 (1957).

68. E.g., testimony of Senator J. William Fulbright, *Hearing on S. 1125 before the Subcommittee on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., *Executive Privilege: The Withholding of Information by the Executive*, at 21 (1971).

69. As to the use of the Armed Forces in the national defense, I have mentioned above that the United States has engaged in at least 204 foreign military hostilities in its history and only five have been declared wars. See text accompanying note 16 to note 19, *supra*.

I have also cited above the prevalence of executive agreements over treaties in every period of our history but the first fifty years. See text accompanying note 20 to note 23, *supra*.

The historical precedents of executive privilege have been well summarized and analyzed by William H. Rehnquist, then Assistant Attorney General, in his appearance before the Senate Subcommittee on Separation of Powers on August 4, 1971. *Hearings on S. 1125, supra* note 68, at 420-438. An exhaustive study covering a concentrated period of time is made in Kramer and Marcuse, *Executive Privilege—A Study of the Period 1953-1960* (pts. 1-2), 29 GEO. WASH. L. REV. 623, 827 (1961).

The principle of usage has been recognized by the Supreme Court as a determining factor in constitutional interpretation. In *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), the Court approved the validity of a long continued practice of the President to withdraw public land from private acquisition even though this conflicted with a statute by Congress which made such lands free and open to occupation and purchase. Using practice to fix the construction, the Court explained, "is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation." *Id.*, 473.

A decade later the Court again looked to usage as a ground in rejecting Congressional control of a Presidential action. In holding that Congress could not shift gears after 73 years of practice and suddenly legislate conditions on the removal by the President of executive officers, even though such practice had often been the subject of bitter controversy, the Court argued:

"Nor can we concur . . . that when Congress, after full consideration and with the acquiescence and long practice of all the branches of the Government, has established the construction of the Constitution, it may by its mere subsequent legislation reverse such construction. It is not given power by itself thus to amend the Constitution. *Myers v. United States*, 272 U.S. 52, 152 (1926).

70. In centralizing the national defense powers in the President, the Framers were influenced by precedents in the practice of European nations, in former plans of union for the colonies, and in the then recently established State constitutions. Berdahl, *supra* note 18, at 115; McClure, *supra* note 20, at 251-258.

The members of the Constitutional Convention were equally familiar with the writings of Locke, Montesquieu, and Blackstone, all of whom saw the making of defensive war and the conduct of foreign relations as being properly the function of the Executive. Locke, *TWO TREATISES ON CIVIL GOVERNMENT* (Gough, ed.) Bk. II, §§ 145-148, 159, 160 (1966); Montesquieu, *SPIRIT OF THE LAWS*, Bk. XI, Ch. 6 (1805); Blackstone, *1 COMMENTARIES*, 253-54.

71. The Constitutional "primacy" of the President in the field of foreign affairs is apparently recognized by *at least six* Justices of the present Supreme Court. Justice Stewart, joined by Justice White, has implicitly stated that the Constitution endows the President with "a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense. . . ." *New York Times Co. v. United States, supra* note 63, at 729.

Justice Blackmun has written:

"Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety." *Id.*, at 761.

Justice Marshall has added that "it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander-in-Chief." *Id.*, at 741.

Chief Justice Burger, joining Justice Harlan and Justice Blackmun, has openly described the scope of executive power as one of "Constitutional primacy in the field of foreign affairs. . . ." *Id.*, at 756.

Justice Rehnquist, joined by the Chief Justice and Justice White, grounded their opinion in a recent "act of state doctrine" case on the underlying basis of "the primacy of the Executive in the conduct of foreign relations" and "the lead role of the executive in foreign policy." *First National City Bank v. Banco Nacional De Cuba*, 406 U.S. 759, 767 (1972).

72. Acheson, *The Eclipse of the State Department*, 49 FOREIGN AFFAIRS 593, 595 (July 1971).

73. *Id.*, at 598, 601.

74. The Council was established by the National Security Act of 1947, approved July 26, 1947, 50 U.S.C. § 402.

75. Concise, authoritative descriptions of the history and role of the National Security Council are in *Hearings Before the Subcom. on National Policy Machinery of the Senate Comm. on Government Operations*, 86th Cong., 2d Sess. (1960) and S. FALK-T. BAUER, NATIONAL SECURITY MANAGEMENT—THE NATIONAL SECURITY STRUCTURE, Chapter III (revised ed. 1972). The former was prepared by two top members of the NSC staff and the latter is a volume furnished for instructional purposes at the Industrial College of the Armed Forces.

76. Fulbright, *supra* note 68, at 21.

77. During debates in the first Congress, James Madison contended that wanton acts of "mal-administration" would subject the President to impeachment and removal. 1 ANNALS OF CONGRESS 498 (1789-1790). Madison even avowed, "I am not afraid to place my confidence in him (the President), especially when I know he is . . . liable to be displaced if his conduct shall have given umbrage during the time he has been in office." *Id.*, at 462.

78. 1 ANNALS OF CONGRESS 585, (1789-1790).

79. E.g., see remarks of James Madison, 1 ANNALS OF CONGRESS 463, 498 (1789-1790).

80. *Myers v. United States*, 272 U.S. 52, 176 (1926).

81. Berger, *Executive Privilege v. Congressional Inquiry* (pts. 1-2), 12 UCLA L. REV. 1044, 1288 (1965), at 1320.

82. 118 Cong. Rec. (daily ed. June 20, 1972), at H5820, H5821; 31 CONG. Q. WEEKLY REP. 294 (1973).

83. See text of President Nixon's March 12, 1973, policy statement on executive privilege. 31 CONG. Q. WEEKLY REP. 608 (1973).

84. Memorandum of Richard Nixon (August 30, 1971), *Hearing on S. 1125*, *supra* note 68, at 45, 46.

85. *Id.*, at 46.

86. The legal bases in support of the Executive's position are set out by Assistant Attorney General Rehnquist, *id.*, at 420-442; Kramer and Marcuse, *supra* note 69, at 898-909.

87. 31 CONG. Q. WEEKLY REP. 294, 295 (1973).

88. *Id.*, at 295. From 1969 to 1973, Secretary of Defense Laird made 86 appearances before Congressional Committees, encompassing over 327 hours of testimony. See White House Executive Privilege Text, *supra* note 83.

89. Berger, *supra* note 81, at 1323.

90. See text of Resolution of Senate Democratic Policy Committee—Re Executive Privilege, 119 CONG. REC. (daily ed. Jan. 18, 1973), at S 798.

91. S. 1125, Am. No. 343, 92d Cong., 1st Sess. (1971); S. 858, 93d Cong., 1st Sess. (1973).

92. 1 Stat. 65, approved June 25, 1789.

93. E.g., Berger, *supra* note 81, at 1060; Fulbright, *supra* note 68, at 24.

94. 1 Stat. 66.

95. 1 ANNALS OF CONGRESS 592-615 (1789-1790).

96. 1 ANNALS OF CONGRESS (1789-1790).

97. Professor Berger, who himself has suggested that the Treasury Act might be an early precedent, nevertheless testified before the Senate Hearing on Executive privilege that:

"Hamilton really wanted to be in a position to intrude, to offer his advice. He wanted to have a pipeline into the Congress, so he could come in and advise the Congress about financial matters . . . With the Treasury Department, they (the first Congress) were more concerned with warding off Hamilton's officiousness. The provision for a call for information was merely designed to bar Hamilton's unsought intrusions." Berger, *Hearings on S. 1125, supra* note 68, at 296, 297.

To which, I might add that Hamilton is quoted by Jefferson as construing the Act creating the Treasury Department as not making him "subject as to be obliged to produce all papers [Congress] might call for." P. Ford, *I THE WRITINGS OF THOMAS JEFFERSON* 190 (1892).

Under a well-settled rule of legislative interpretation, Federal courts are compelled to resort to the legislative history of a statute to determine whether, in light of the articulated purposes of the legislation, Congress intended that the statute apply to the particular cases in question. *Allen v. Board of Elections*, 393 U.S. 544, 570 (1969). From the mass of the legislative history articulating the purposes of the Treasury Act of 1789, as so well explained by Professor Berger himself, it is clear the Members of the first Congress gave no thought to the statute as being applicable to information which the Executive might determine could not be safely communicated, but had in mind only information of a kind which the Executive would furnish voluntarily or indeed might thrust upon them.

Similarly, a 1928 Act of Congress pertaining to the furnishing by Executive Departments of any information requested by the Senate and House Committees on Government Operations (45 Stat. 996) was intended by Congress to include only information of types which the Executive had previously furnished to Congress voluntarily. Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B. J. 103, 322, 323 (1949).

Should Congress pass a statute plainly requiring the Executive to provide all kinds of information without any room for Executive discretion, I believe the statute would be unconstitutional to the extent it invades the President's independent prerogative to withhold information in the areas of foreign relations, national defense, pending law enforcement matters, internal discussions, or confidential investigative reports. See text at notes 98 to 104.

98. Senator Ervin, who chaired Senate hearings on executive privilege, appears to agree on these limited areas of independent Presidential power. Ervin, *id.* at 252, 253.

99. White House Executive Privilege Text, *supra* note 83.

100. *Id.*, at 609.

His announcement does not indicate that President Nixon has thrown a blanket immunity over his private staff. The President declared, both at his press conference of January 31, 1973, and in his formal paper of March 12, 1973, that "the question of whether circumstances warrant the exercise of executive privilege should be determined on a case-by-case basis." *Id.*, at 609.

Applying this rule to the merits of the Watergate affair, where wrongdoing has been charged, the President announced that all members of the White House staff will appear voluntarily, when requested, before the Senate select committee (known as the Ervin committee) which is investigating this case. The President said any of his staff so invited will testify under oath and will answer fully all proper questions. "Executive privilege will not be invoked as to any testimony concerning possible criminal conduct, or discussions of possible criminal conduct . . ." Text of President Nixon's announcements concerning the Watergate matter, *The Wash. Post*, April 18, 1973, at A-24, cols. 1-3; *The Evening Star-News*, May 23, 1973, at A-10, col. 5.

White House staff members also were directed to testify before a Federal grand jury investigating Watergate if called. *The Wash. Post*, Mar. 31, 1973, at A 1, col. 7, A 11, col. 1.

101. "No case has authoritatively determined the extent to which Congress may compel the production of testimony or documents from the executive branch of government . . ." Borman, *Policing the Executive Privilege*, 5 U. OF MICH. J. OF LAW REFORM 568 (Spring 1972), at 569.

102. E.g., Am. Law Div., Lib. of Cong., Memorandum of June 7, 1971, *Hearings on S. 1125, supra* note 68, at 543-551.

103. See note 69, *supra*.

104. The Supreme Court has remarked that the scope of the Congressional power of inquiry "is not without limitations." More specifically, the Court said

Congress "cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. . . . Neither can it supplant the Executive in what exclusively belongs to the Executive." *Barenblatt v. United States*, 360 U.S. 109, 111, 112 (1959).

105. Ex. Order 11652 of March 8, 1972, WEEKLY COMP. OF PRES. DOC., March 13, 1972, at 545.

106. Federal Times, Aug. 23, 1972, at 4.

107. N.Y. Times, March 9, 1972, at 12, col. 4.

108. Ex. Order 11652, *supra* note 105, § 5 (B).

109. *Id.*, § 5 (C).

110. *Id.*, § 5 (E).

111. THE INTERAGENCY CLASSIFICATION REVIEW COMMITTEE PROGRESS REPORT (March 31, 1973.)

112. N.Y. Times, *supra* note 107; Ex. Order 11652, *supra* note 105, § 2.

113. N.Y. Times, *id.* at col. 5.

114. 37 Fed. Reg. 10053 (May 19, 1972); Wash. Post, Dec. 14, 1972, at H 4, cols. 4-5.

115. *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), interpreting the Freedom of Information Act of 1966.

116. *Id.*, concurring opinion of Stewart, J., at 736.

117. N.Y. Times Co. v. *United States*, *supra* note 63.

118. See concurring opinions respectively of Stewart, White, and Marshall, J. J. and dissenting opinions of Chief Justice Burger, Harlan, J., and Blackmun, J., *Id.*

119. See concurring opinions of White, J., *id.*, at 733; Marshall, J., *id.*, at 745; dissenting opinion of Burger, C. J., *id.*, at 752.

120. 18 U.S.C. 793, which prohibits the "communication" of national defense information to a person not entitled to it; 18 U.S.C. 794(b), (1948) which prohibits the "communication" or "publication" of the disposition of the armed forces in time of war; 18 U.S.C. 797, (1948) which prohibits the transfer or "publication" of photos of defense installations, and 18 U.S.C. 798, (1948), which prohibits the transfer or "publication" of cryptography or communication of intelligence information.

Other limited provisions are found in other titles of the U.S. Code, e.g., 50 U.S.C. 783(b), (1950). See generally the concurring opinion of White, J., in *New York Times v. United States*, *id.*, at 736-739.

121. See the Government's charges against Daniel Ellsberg and Anthony J. Russo, Jr. accused of espionage, conspiracy, and unauthorized use of government information for releasing the Pentagon Papers. *United States v. Anthony Joseph Russo, Jr. and Daniel Ellsberg*, no. 9373-Cd-WMB. (C.D. Cal.), and the ruling by the court granting defendants' motion for dismissal; the Wash. Post, May 12, 1973, at A 14, Cols. 4-6.

122. See *Barenblatt v. United States*, *supra*, note 104.

123. *New York Times v. United States*, *supra* note 63, at 729, 730.

124. *Id.*, at 728.

125. E.g., see declaration of purpose set forth in text of S. 440, 92d Cong., 1st Sess. (1973), § 2.

126. E.g., see, the 1973 report of the Senate Subcommittee on Separation of Powers which boldly lays claim to "congressional supremacy" in this and all other areas of public policy on the basis of the "necessary and proper clause." *Report of Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., *Congressional Oversight of Executive Agreements*, at 5, 6, 9 (1973).

127. E.g., see question of Senator Ervin, *Hearing on S. 1125*, *supra* note 68, at 211, 212; declaration of Congressional authority expressed in Amendment no. 343, by Senator Fulbright, to S. 1125, 92d Cong., 1st Sess. (1971), § 307(a).

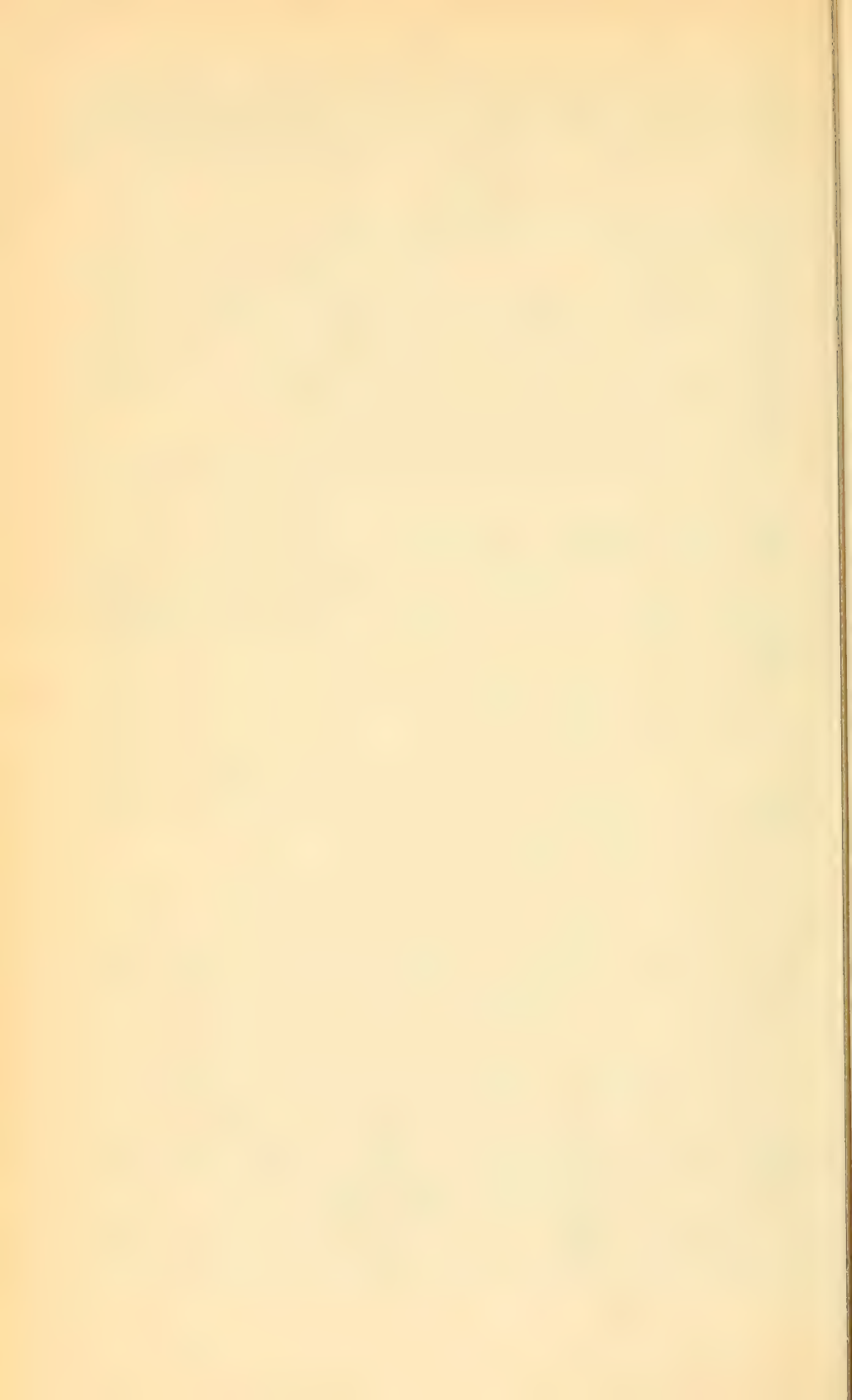
128. *Myers v. United States*, *supra* note 80, at 127.

129. *Pomeroy*, *supra* note 62, at 289; Stevens, *Hearing on S. 3475*, *supra* note 22, at 267, 268; J. Moore, letter of May 15, 1972, *id.* at 629-632; Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L. J. 345 (1955), at 387, 388.

130. D. ACHESON, FRAGMENTS OF MY FLEECE 196 (1971).

131. Solzhenitsyn, *The Truth of Art*, reprinted in the Wash. Post Outlook B1, at B4, cols. 2, 3 (Aug. 27, 1972).

132. J. Q. Adams, *An Eulogy on the Life and Character of James Madison*, September 27, 1836, 72, 73 (1836).



EXECUTIVE PRIVILEGE

PART 2—PRESIDENTIAL AND ADMINISTRATION STATEMENTS

[From Presidential Documents, Vol. 9, No. 5, 1973]

Excerpt of President Nixon's News Conference of Jan. 31, 1973

EXECUTIVE PRIVILEGE

Q. Mr. President.

THE PRESIDENT. Mr. Mollenhoff.

Q. Did you approve of the use of executive privilege by Air Force Secretary Seaman in refusing to disclose the White House role in the firing of air cost analyst Fitzgerald?

It came up yesterday in the Civil Service hearings. He used executive privilege. You had stated earlier that you would approve all of these uses of executive privilege, as I understood it, and I wondered whether your view still prevails in this area or whether others are now entitled to use executive privilege on their own in this type of case?

THE PRESIDENT. Mr. Mollenhoff, your first assumption is correct. In my dealings with the Congress—I say mine, let me put it in a broader sense—in the dealings of the Executive with the Congress, I do not want to abuse the executive privilege proposition where the matter does not involve a direct conference with or discussion within the Administration, particularly where the President is involved. And where it is an extraneous matter as far as the White House is concerned, as was the case when we waived executive privilege for Mr. Flanagan last year, as you will recall, we are not going to assert it.

In this case, as I understand it—and I did not approve this directly, but it was approved at my direction by those who have the responsibility within the White House—in this case it was a proper area in which the executive privilege should have been used.

On the other hand, I can assure you that all of these cases will be handled on a case-by-case basis and we are not going to be in a position where an individual, when he gets under heat from a Congressional committee, can say, "Look, I am going to assert executive privilege."

He will call down here, and Mr. Dean, the White House Counsel, will then advise him as to whether or not we approve it.

Q. I want to follow one question on this.

THE PRESIDENT. Sure.

Q. This seems to be an expansion of what executive privilege was in the past and you were quite critical of executive privilege in 1948 when you were in the Congress—

THE PRESIDENT. I certainly was.

Q. You seem to have expanded it from conversation with the President himself to conversation with anyone in the executive branch of the Government and I wonder, can you cite any law or decision of the courts that supports that view?

THE PRESIDENT. Well, Mr. Mollenhoff, I don't want to leave the impression that I am expanding it beyond that. I perhaps have not been as precise as I should have been. And I think yours is a very legitimate question because you have been one who has not had a double standard on this. You have always felt that executive privilege, whether I was complaining about its use when I was an investigator or whether I am now defending its use when others are doing the investigating—I understand that position.

Let me suggest that I would like to have a precise statement prepared which I will personally approve so that you will know exactly what it is. I discussed

this with the leaders and we have talked, for example—the Republicans like Senator Javits and Senator Percy, are very interested in it, not just the Democrats, and I understand that. But I would rather, at this point, not like to have just an off the top of my head press conference statement delineate what executive privilege will be.

I will simply say the general attitude I have is to be as liberal as possible in terms of making people available to testify before the Congress, and we are not going to use executive privilege as a shield for conversations that might be just embarrassing to us, but that really don't deserve executive privilege.

A. ERNEST FITZGERALD

Q. The specific situation with regard to Fitzgerald, I would like to explore that. That dealt with a conversation Seamans had with someone in the White House relative to the firing of Fitzgerald and justification or explanations. I wonder if you feel that that is covered and did you have this explained to you in detail before you made the decision?

THE PRESIDENT. Let me explain. I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me.

No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it.¹

[From Presidential Documents, Vol. 9, No. 11, 1973]

Statement by the President, March 12, 1973

EXECUTIVE PRIVILEGE

During my press conference of January 31, 1973, I stated that I would issue a statement outlining my views on executive privilege.

The doctrine of executive privilege is well established. It was first invoked by President Washington, and it has been recognized and utilized by our Presidents for almost 200 years since that time. The doctrine is rooted in the Constitution, which vests "the Executive Power" solely in the President, and it is designed to protect communications within the executive branch in a variety of circumstances in time of both war and peace. Without such protection, our military security, our relations with other countries, our law enforcement procedures, and many other aspects of the national interest could be significantly damaged and the decisionmaking process of the executive branch could be impaired.

The general policy of this Administration regarding the use of executive privilege during the next 4 years will be the same as the one we have followed during the past 4 years and which I outlined in my press conference: Executive privilege will not be used as a shield to prevent embarrassing information from being made available but will be exercised only in those particular instances in which disclosure would harm the public interest.

I first enunciated this policy in a memorandum of March 24, 1969, which I sent to Cabinet officers and heads of agencies. The memorandum read in part:

"The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For these reasons executive privilege will not be used without specific Presidential approval."

In recent weeks, questions have been raised about the availability of officials in the executive branch to present testimony before committees of the Congress.

¹At his afternoon news conference on Thursday, February 1, 1973, Press Secretary Ronald L. Ziegler said that the President "indicated to me that after reading the transcript of yesterday's press conference that he was mistaken in his reference to Mr. Fitzgerald, and the fact of the matter is that the President did not, as indicated in the press conference, have put before him the decision regarding Mr. Fitzgerald.

"We can find no record—the President requested that a check be made of this—of the matter ever being brought to the President's attention for a decision.

"So the decision regarding the reorganization that took place in the Air Force, which dealt with Mr. Fitzgerald, was a matter dealt with solely by the Air Force."

As my 1969 memorandum dealt primarily with guidelines for providing information to the Congress and did not focus specifically on appearances by officers of the executive branch and members of the President's personal staff, it would be useful to outline my policies concerning the latter question.

During the first 4 years of my Presidency, hundreds of Administration officials spent thousands of hours freely testifying before committees of the Congress. Secretary of Defense Laird, for instance, made 86 separate appearances before Congressional committees, engaging in over 327 hours of testimony. By contrast, there were only three occasions during the first term of my Administration when executive privilege was invoked anywhere in the executive branch in response to a Congressional request for information. These facts speak not of a closed Administration but of one that is pledged to openness and is proud to stand on its record.

Requests for Congressional appearances by members of the President's personal staff present a different situation and raise different considerations. Such requests have been relatively infrequent through the years, and in past administrations they have been routinely declined. I have followed that same tradition in my Administration, and I intend to continue it during the remainder of my term.

Under the doctrine of separation of powers, the manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of Government. If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the Presidency.

This tradition rests on more than Constitutional doctrine: It is also a practical necessity. To insure the effective discharge of the executive responsibility, a President must be able to place absolute confidence in the advice and assistance offered by the members of his staff. And in the performance of their duties for the President, those staff members must not be inhibited by the possibility that their advice and assistance will ever become a matter of public debate, either during their tenure in Government or at a later date. Otherwise, the candor with which advice is rendered and the quality of such assistance will inevitably be compromised and weakened. What is at stake, therefore, is not simply a question of confidentiality but the integrity of the decisionmaking process at the very highest levels of our Government.

The considerations I have just outlined have been and must be recognized in other fields, in and out of government. A law clerk, for instance, is not subject to interrogation about the factors or discussions that preceded a decision of the judge.

For these reasons, just as I shall not invoke executive privilege lightly, I shall also look to the Congress to continue this proper tradition in asking for executive branch testimony only from the officers properly constituted to provide the information sought, and only when the eliciting of such testimony will serve a genuine legislative purpose.

As I stated in my press conference on January 31, the question of whether circumstances warrant the exercise of executive privilege should be determined on a case-by-case basis. In making such decisions, I shall rely on the following guidelines:

1. In the case of a department or agency, every official shall comply with a reasonable request for an appearance before the Congress, provided that the performance of the duties of his office will not be seriously impaired thereby. If the official believes that a Congressional request for a particular document or for testimony on a particular point raises a substantial question as to the need for invoking executive privilege, he shall comply with the procedures set forth in my memorandum of March 24, 1969. Thus, executive privilege will not be invoked until the compelling need for its exercise has been clearly demonstrated and the request has been approved first by the Attorney General and then by the President.

2. A Cabinet officer or any other Government official who also holds a position as a member of the President's personal staff shall comply with any reasonable request to testify in his non-White House capacity, provided that the performance of his duties will not be seriously impaired thereby. If the official believes that the request raises a substantial question as to the need for invoking executive privilege, he shall comply with the procedures set forth in my memorandum of March 24, 1969.

3. A member or former member of the President's personal staff normally shall follow the well-established precedent and decline a request for a formal appearance before a committee of the Congress. At the same time, it will continue to

be my policy to provide all necessary and relevant information through informal contacts between my present staff and committees of the Congress in ways which preserve intact the Constitutional separation of the branches.

NOTE.—The text of the memorandum to which the statement refers was also made available by the White House Press Office, as follows:

MARCH 24, 1969.

Memorandum for the heads of executive departments and agencies

Subject: Establishing a procedure to govern compliance with congressional demands for information

The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons executive privilege will not be used without specific Presidential approval. The following procedural steps will govern the invocation of executive privilege:

1. If the head of an executive department or agency (hereafter referred to as "department head") believes that compliance with a request for information from a Congressional agency addressed to his department or agency raises a substantial question as to the need for invoking executive privilege, he should consult the Attorney General through the Office of Legal Counsel of the Department of Justice.

2. If the department head and the Attorney General agree, in accordance with the policy set forth above, that executive privilege shall not be invoked in the circumstances, the information shall be released to the inquiring Congressional agency.

3. If the department head and the Attorney General agree that the circumstances justify the invocation of executive privilege, or if either of them believes that the issue should be submitted to the President, the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision.

4. In the event of a Presidential decision to invoke executive privilege, the department head should advise the Congressional agency that the claim of executive privilege is being made with the specific approval of the President.

5. Pending a final determination of the matter, the department head should request the Congressional agency to hold its demand for the information in abeyance until such determination can be made. Care shall be taken to indicate that the purpose of this request is to protect the privilege pending the determination, and that the request does not constitute a claim of privilege.

RICHARD NIXON.

On March 14, 1973, the White House Press Office made available the text of a letter from John W. Dean III, Counsel to the President, to Senator James O. Eastland, Chairman of the Committee on the Judiciary, as follows:

March 14, 1973

Dear Mr. Chairman:

I am writing to acknowledge receipt of your letter of March 13, 1973, and the enclosed invitation to appear and testify before the Senate Committee on Judiciary on matters relating to the qualifications of L. Patrick Gray, III to be Director of the FBI. As a member of the personal staff of the President, and consistent with the President's statement of March 12, 1973, on executive privilege, I must respectfully decline the invitation of the Committee to formally appear and testify.

However, as the President has stated, it is the policy of this Administration to provide all necessary and relevant information to the Congress and that members of the President's personal staff will provide such information in a manner that preserves intact the Constitutional separation of the branches. Accordingly, if the Senate Committee on Judiciary believes that I can be of assistance in providing relevant information and wishes to submit questions to

me that have a bearing on the nomination of Mr. Gray, I will be pleased to respond consistent with the President's statement.

Respectfully yours,

JOHN W. DEAN III,
Counsel to the President.

[Honorable James O. Eastland, Chairman, Committee on the Judiciary, United States Senate, Washington, D.C. 20510]

[From Presidential Documents, Vol. 9, No. 11, 1973]

Excerpt of President Nixon's News Conference of Mar. 15, 1973

QUESTIONS

TESTIMONY OF WHITE HOUSE COUNSEL BEFORE CONGRESSIONAL COMMITTEE

Q. Mr. President, do you plan to stick by your decision not to allow Mr. Dean to testify before the Congress,¹ even if it means the defeat of Mr. Gray's nomination?

THE PRESIDENT. I have noted some speculation to the effect that the Senate might hold Mr. Gray as hostage to a decision on Mr. Dean. I cannot believe that such responsible Members of the United States Senate would do that, because as far as I am concerned, my decision has been made.

I answered that question rather abruptly, you recall, the last time it was asked by one of the ladies of the press here. I did not mean to be abrupt, I simply meant to be firm.

Mr. Dean is Counsel to the White House. He is also one who was counsel to a number of people on the White House Staff. He has, in effect, what I would call a double privilege, the lawyer-client relationship, as well as the Presidential privilege.

And in terms of privilege, I think we could put it another way. I consider it my constitutional responsibility to defend the principle of separation of powers. I recognize that many Members of the Congress disagree with my interpretation of that responsibility.

But while we are talking on that subject—and I will go on at some length here because it may anticipate some of your other questions—I am very proud of the fact that in this Administration we have been more forthcoming in terms of the relationship between the executive, the White House, and the Congress, than any administration in my memory. We have not drawn a curtain down and said that there could be no information furnished by members of the White House Staff because of their special relationship to the President.

All we have said is that it must be under certain circumstances, certain guidelines, that do not infringe upon or impair the separation of powers that are so essential to the survival of our system.

In that connection, I might say that I had mentioned previously that I was once on the other side of the fence, but what I am doing here in this case is cooperating with the Congress in a way that I asked the then President, Mr. Truman, to cooperate with a committee of the Congress 25 years ago and in which he refused.

I don't say that critically of him now—he had his reasons, I have mine. But what we asked for in the hearings on the Hiss case—and all of you who covered it, like Bill Tels and others, will remember—what we asked for was not that the head of the FBI or anybody from the White House Staff testify. There was very widespread information that there was a report of an investigation that had been made in the Administration about the Hiss case. We asked for that report. We asked for the FBI information with regard to that report.

And Mr. Truman, the day we started our investigation, issued an executive order in which he ordered everybody in the executive department to refuse to cooperate with the committee under any circumstances.² The FBI refused all information. We got no report from the Department of Justice. And we had to go forward and break the case ourselves.

¹ See letter from John Dean to Senator Eastland, p. 200.

² See Public Papers of the Presidents, Harry S. Truman, 1948 volume, Item 170[4].

We did. And, to the credit of the Administration, after we broke the case, they proceeded to conduct the prosecution and the FBI went into it.

I would like to say, incidentally, that I talked to Mr. Hoover at that time. It was with reluctance that he did not turn over that information—reluctance, because he felt that the information, the investigation they had conducted, was very pertinent to what the committee was doing.

Now, I thought that decision was wrong. And so when this Administration has come in, I have always insisted that we should cooperate with Members of the Congress and with the committees of the Congress. And that is why we have furnished information. But, however, I am not going to have the Counsel to the President of the United States testify in a formal session for the Congress. However, Mr. Dean will furnish information when any of it is requested, provided it is pertinent to the investigation.

Q. Mr. President, would you then be willing to have Mr. Dean sit down informally and let some of the Senators question him, as they have with Dr. Kissinger?

THE PRESIDENT. No, that is quite a different thing. In fact, Dr. Kissinger, Mr. Ehrlichman, as you know, not only informally meet with Members of the Congress in matters of substance, the same is true with members of the press. As you know, Dr. Kissinger meets with you ladies and gentlemen of the press and answers questions on matters of substance.

In this case, where we have the relationship that we have with Mr. Dean and the President of the United States—his Counsel—that would not be a proper way to handle it. He will, however—the important thing is, he will furnish all pertinent information. He will be completely forthcoming—something that other Administrations have totally refused to do until we got here. And I am very proud of the fact that we are forthcoming, and I would respectfully suggest that Members of the Congress might look at that record as they decide to test it.

THE WHITE HOUSE,
Washington, April 20, 1972.

DR. JEREMY J. STONE,
Director, Federation of American Scientists, 203 C Street, N.E., Washington, D.C.
20002, 546-3300.

DEAR DR. STONE: Thank you for your recent letter enclosing a copy of the F.A.S. Newsletter with the article on executive privilege. I found the article most interesting.

You asked whether President Nixon or any former Presidents have ever asserted a claim that Presidential aides have blanket immunity from testifying before the Congress on any subject. I am not aware of any public statement by President Nixon or any past President to this effect.

This Administration adheres to the same doctrine of executive privilege which has been developed through precedent and tradition, and followed by all recent administrations. The precedents indicate that no recent President has ever claimed a "blanket immunity" that would prevent his assistants from testifying before the Congress on any subject. The fact that this Administration has also not made such a broad assertion is clearly evidenced by the examples cited in your newsletter and the testimony of Mr. Flanigan before the Senate Judiciary Committee.

With best regards.

Sincerely,

JOHN W. DEAN III,
Counsel to the President.

THE WHITE HOUSE,
Washington, D.C., April 10, 1972.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On Friday afternoon, April 7, 1972, Mr. John Holloman of your staff telephoned Mr. Peter Flanigan, Assistant to the President, to invite him to appear and testify before your Committee on April 12, 1972, at 10:30 AM, in connection with the Committee's hearings relating to the confirmation of Mr. Richard G. Kleindienst as Attorney General. This letter is in response to the Committee's invitation.

Mr. Flanigan is one of the Assistants to the President provided for in Sections 105 and 106 of Title 3 of the United States Code. Under the doctrine of separation

of powers, and long established historical precedents, the principle that members of the President's immediate staff not appear and testify before congressional committees with respect to the performance of their duties is firmly established. Accordingly, by reason of this long established and fundamental principle of our federal system, Mr. Flanigan cannot accept the Committee's invitation to appear on April 12, 1972.

Mr. Flanigan's name has been brought into the discussion during the present hearings in connection with the efforts of former Assistant Attorney General McLaren to obtain independent financial expertise to assist in evaluating financial aspects of the ITT antitrust suits. After reviewing the transcripts of your hearings to date with Mr. Flanigan, I can and do certify to you and your Committee that Mr. Flanigan's involvement in this matter was as stated by Judge McLaren in his sworn testimony. Mr. Flanigan merely responded to Mr. McLaren's request to assist him in obtaining such expertise. I might also add that Mr. Flanigan did not directly or indirectly contribute to the findings and conclusions of the independent expert.

Respectfully yours,

JOHN W. DEAN III.
Counsel to the President.

APRIL 21, 1972.

Hon. RICHARD M. NIXON,
The President,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: In Mr. John Dean's letter of April 10, 1972, to the Chairman of the Senate Judiciary Committee informing us of Mr. Petter M. Flanigan's initial refusal to appear before the Committee, Mr. Dean states:

"Under the doctrine of separation of powers and long established historical precedents the principle that members of the President's immediate staff not appear and testify before Congressional committees with respect to the performance of their duties is firmly established."

In view of the scope of executive privilege suggested in Mr. Dean's letter, I am writing to request a clarification of his reference to "long established historical precedents" to substantiate his claim.

Specifically, please identify each instance in which a member of the immediate White House staff was requested or subpoenaed to testify before a congressional committee and declined to appear by formally claiming "executive privilege", or as in the instant example, informally asserting the privilege.

In addition, please include information on all instances when a White House employee has testified before a congressional committee, regardless of the capacity in which he may have appeared. I realize that individual members of the immediate White House staff sometimes function in different capacities, therefore, in each example cited, it would be most helpful if you would specify the capacity in which the individual appeared, as well as identifying the committee he appeared before, the date, and the subject of his testimony. I would appreciate your giving me this information for all instances from the administration of Franklin Roosevelt to the present.

Thank you for your cooperation in this matter.

With kindest wishes,
Sincerely yours,

SAM J. ERVIN, Jr., *Chairman.*

THE WHITE HOUSE,
Washington, April 25, 1972.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate,
Washington, D.C. 20510.

DEAR SENATOR ERVIN: This is to acknowledge your April 21 letter to the President requesting clarification of Mr. John Dean's letter of April 10 to the Chairman of the Senate Judiciary Committee.

I shall call your letter to the President's attention at the earliest opportunity.

With cordial regards,

Sincerely,

WILLIAM E. TIMMONS,
Assistant to the President.

THE WHITE HOUSE.
Washington, June 30, 1972.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR CHAIRMAN ERVIN: This letter is in response to your recent letter seeking information of all instances in which members of the White House staff or a White House employee either declined to appear before a congressional committee, or did appear and testify before such committee.

As I am certain you realize, the White House maintains no records in this regard as to past administrations. The Department of Justice, however, through its records and other research, has knowledge of six incidents involving Presidential Assistants which occurred prior to Mr. Flanigan's recent testimony. In addition to those six, I understand that there have been numerous occasions in past administrations as well as this Administration when Presidential Assistants have declined congressional invitations to appear and testify on an informal basis.

Following the sequence of your letter, I shall begin with the instances in which White House staff members declined to appear before congressional committees:

1. During the Truman Administration, a subcommittee of the House Committee on Education and Labor investigating the manner in which the Taft-Hartley Act was administered during a strike against Government Services, Inc., caused subpoenas to be served on Presidential Assistant John R. Steelman directing him to appear before the subcommittee on two separate occasions. H. Rept. 1595, 80th Cong., 2d Sess., p. 3. The committee apparently sought to interrogate him with respect to statements made to him by the President with respect to the strike. *Id.*, at p. 12. Mr. Steelman did not comply with the subpoenas but returned both of them with a letter stating *inter alia* that "the President directed me, in view of my duties as his assistant, not to appear before your subcommittee." *Id.*, at p. 3. See also *Investigation of the GSI Strike*, Hearings before a Special Committee of the Committee on Education and Labor, House of Representatives, 80th Cong., 2d Sess., pp. 347-353.

2. During the investigation of the Dixon-Yates contract, which occurred in the Eisenhower Administration, a subcommittee of the Senate Judiciary Committee twice invited Presidential Assistant Sherman Adams to testify with respect to his request to the Securities and Exchange Commission that it postpone a hearing relating to the financing of the contract. Mr. Adams declined to comply with those invitations because of "his official and confidential relationship with the President." *Power Policy, Dixon-Yates Contract*, Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 84th Cong., 1st Sess., pp. 676, 779. He did, however, as shown *infra*, appear and testify subsequently with respect to another subject matter.

3. During the Johnson Administration the Senate Committee on the Judiciary invited Mr. DeVier Pierson, Associate Special Counsel to the President, to testify with respect to the question whether Mr. Justice Fortas had taken part in the drafting of legislation authorizing Secret Service protection for Presidential candidates. Mr. Pierson declined the invitation on the ground that it has been firmly established "that members of the President's immediate staff shall not appear before a Congressional committee to testify with respect to the performance of their duties on behalf of the President." *Nominations of Abe Fortas and Homer Thornberry*, Hearings before the Committee on the Judiciary, United States Senate, 90th Cong., 2d Sess., pp. 1347, 1348.

There have been several instances where members of the immediate White House staff appeared and testified before congressional committees. With a single exception the testimony related to the witness' private conduct.

1. In 1944, in the course of an investigation into the administration of the Rural Electrification Administration during the administration of President Franklin Roosevelt, Jonathan W. Daniels, Administrative Assistant to the President, appeared before a subcommittee of the Senate Committee on Agriculture and Forestry in compliance with a subpoena served on him. *Administration of the Rural Electrification Administration Act*, Hearing before a Subcommittee of the Committee on Agriculture and Forestry, United States Senate, 78th Cong., 1st Sess., pp. 611, 659, 691. He refused, however, to answer most of the questions addressed to him on the ground of his confidential relationship to the President. *Id.*, pp. 612-629. When the subcommittee indicated that it might initiate contempt proceedings against Mr. Daniels (*id.*, p. 694), President Roose-

velt authorized him to testify (*id.*, p. 740), and Mr. Daniels did so. *Id.*, pp. 695-739.

2. In the Truman Administration, Presidential Assistant Donald S. Dawson testified in 1951 before the Subcommittee of the Senate Committee on Banking and Currency, with the specific approval of President Truman, to answer charges that he had accepted gratuities from persons who sought favors from government agencies. *Study of the Reconstruction Finance Corporation, Hearings* before a Subcommittee of the Senate Committee on Banking and Currency, United States Senate, 82nd Cong., 1st Sess., pp. 1709, 1795, 1810. According to newspaper reports President Truman believed that the subcommittee's request that Mr. Dawson testify constituted a violation of the principle of the separation of powers. Nevertheless, he "reluctantly" authorized Mr. Dawson to testify in order to give him an opportunity to clear his name. *New York Times*, May 5, 1951, p. 15; May 11, 1951, pp. 1, 20; May 12, 1951, pp. 1, 12.

3. Presidential Assistant Sherman Adams testified in 1958 with respect to his personal relations to Bernard Goldfine and the favors he had received from him. *Investigation of Regulatory Commissions and Agencies, Hearings* before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 85th Cong., 2d Sess., pp. 3711-3740.

You have also requested information on all instances when a member of the White House Office staff has testified before a congressional committee in a different capacity. Again, my information in regard to past administrations is very sketchy. I have been informed that during the administration of President Johnson, Mr. Sargent Shriver testified as Director of the Office of Economic Opportunity while he was also a Special Assistant to the President. In like fashion, Mr. Donald Rumsfeld testified as Director of the Office of Economic Opportunity while he was a Counsellor to the President in this Administration.

Other Presidential Assistants who testify before Congress in a second capacity are Dr. Edward E. David, Jr., Science Advisor to the President, who has testified as the Director of the Office of Science and Technology; Dr. Jerome H. Jaffe, Special Consultant to the President for Narcotics and Dangerous Drugs, who has testified as Director, Special Action Office for Drug Abuse Prevention; and Mrs. Virginia H. Knauer, Special Assistant to the President for Consumer Affairs, who has testified as Director, Office of Consumer Affairs.

I hope that you find this information to be responsive to your inquiry. Unfortunately, the lack of adequate records on this subject prevents a more detailed discussion of the precedents.

With best regards.

Sincerely,

JOHN W. DEAN III.
Counsel to the President.

THE WHITE HOUSE,
Washington, November 20, 1972.

HON. ELMER B. STAATS,
Comptroller General of the United States, 441 G Street NW., Washington, D.C. 20548.

DEAR MR. STAATS: This is in response to your letters of October 31, 1972 and November 1, 1972 to Mr. H. R. Haldeman requesting permission to examine certain records and documents.

Please be advised that the account records for the Executive Office of the President for the period of fiscal year 1969 to the present are available for review by the General Accounting Office, as authorized by sections 53 and 71, Title 31 of the United States Code. Noble Melencamp, Chief Executive Clerk (456-2594) has been instructed to make these records available at your convenience, and should be contacted to make the necessary arrangements.

With regard to your request to examine manifest data concerning Presidential flights made during the month of September 1972, I must advise you that information of this nature has traditionally been considered personal to the President and thus not the proper subject of Congressional inquiry. All political flights made during September were billed to the Committee to Re-Elect the President, and that data will, of course, be reflected in the Committee's financial reports.

With kind regards.

Sincerely,

JOHN W. DEAN III.
Counsel to the President.

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C., April 20, 1973.

Hon. RICHARD G. KLEINDIENST,
Attorney General of the United States,
Washington, D.C.

DEAR MR. KLEINDIENST: In further reference to your testimony at the joint hearings of the Senate Subcommittee on Separation of Powers, Subcommittee on Intergovernmental Relations, and Subcommittee on Administrative Practice and Procedures, on April 10, 1973, there were a number of questions concerning Executive privilege which I did not have an opportunity to propound to you during the hearings because of the limitations of time.

I am attaching a list of questions that I would appreciate your answering for the benefit of the joint subcommittees and for inclusion in the record of the hearings. Since these hearings will be printed in the near future, I shall appreciate receiving your written answers to these questions as soon as possible.

With all kind wishes, I am

Sincerely yours,

SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Separation of Powers.

Enclosure.

APRIL 20, 1973.

QUESTIONS TO FOLLOW UP ON THE TESTIMONY OF THE ATTORNEY GENERAL GIVEN
APRIL 10, 1973

1. In your prepared statement, you said, "The right of the Executive to withhold information from Congress and the courts is . . . well recognized," citing *United States v. Reynolds*. That case, as you mentioned, dealt with the production of documents in a tort action against the government. Do you know of any case in which the Supreme Court has recognized "the right of the Executive to withhold information from Congress"?

(a) If there is no Supreme Court case to that effect, is there any case from any Federal court recognizing such a "right"?

(b) If there are no cases, then who is it that recognizes such a right?

2. In your prepared statement, you indicate that "There is no authoritative court decision on Congressional power to compel production of documents or testimony on the part of members of the Executive branch."

That being so, is it the position of the Department of Justice that the President can, under the Constitution, make final determinations as to the nature of the powers of his office? In this connection, you may desire to refer to the decision of the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which the Court invalidated President Truman's assertion of a power to seize the steel mills during the Korean conflict. Does this decision not stand for the principle that the actions of the President as Chief Executive are reviewable in the courts, with the ultimate decision to rest with the Supreme Court?

3. Is it the position of the Department of Justice that constitutional law can be created by "prescription," that is, by practice (custom or usage) of either the Executive or the Legislative branches?

4. You used the term "the public interest" in your prepared remarks. By what criteria is "the public interest" determined by the Executive? Have any such criteria or standards of judgment ever been published or otherwise articulated? Further, is it the position of the Department of Justice that only the President can determine "the public interest"?

5. In answer to a question by Senator Chiles, you stated, in effect, that the second part of the "necessary and proper" clause of the Constitution (Article I, Section 8, Clause 18) would not be construed by the Supreme Court to validate a Congressional statute requiring testimony from officers of the Executive Branch. Please cite cases in which the Supreme Court has so held, or has held that Congress cannot legislate the metes and bounds of the activities of members of the Executive branch.

6. Does not your view of Article I, Section 8, Clause 18, render the latter part of that clause mere surplusage? Can you demonstrate to the Congress any provision of the Constitution that has been rendered a nullity by the Supreme Court?

7. What is the legal basis for your assertion, in your response to questioning by Senator Muskie, that the President could validly refuse to permit *any* employee of the Executive branch to testify before Congress?

8. What is the legal basis for the Presidential assertion that "executive privilege" attaches to individuals who served in the White House but who have left to return to private life?

(a) Does that assertion of privilege attach also to individuals who were on the staffs of other Presidents (for example, President Lyndon Johnson)? If not, why not? If so, under what legal theory can one President assert a privilege for members of the staffs of other Presidents?

9. 5 United States Code, Sec. 2954, reads as follows: "An Executive agency on request of the Committee on Government Operations of the House of Representatives, or any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee."

What is the position of the Department of Justice on the constitutionality of that statute? Give reasons for your answer.

10. Comptroller General Staats testified that the General Accounting Office was refused certain information concerning tax-paid flights made by Government aircraft last year, the stated reason being "executive privilege" invoked by Mr. John W. Dean, Counsel to the President.

Set out in detail the legal basis for refusing those records to the General Accounting Office. In your reply, indicate why, as Mr. Staats testified, passenger lists "for all White House flights, even those not flown by the presidential crew" were considered to be "personal to the President." Does not this position logically mean that everything that happens in the White House, or is done by anyone employed in the White House, is personal to the President? If not, where is the line drawn between activities "personal to the President" and those that are not?

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., May 15, 1973.

HON. SAM J. ERVIN, Jr.,

Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am pleased to enclose the answers to the questions you sent to me as a consequence of my testimony before the Senate Subcommittees on Separation of Powers, Intergovernmental Relations, and Administrative Practices and Procedures on April 10 on the topic of Executive Privilege. I trust these responses will be helpful to you and to the Subcommittee.

I wish you well in your continued activities in this area in which we have a basic mutual concern despite some differences on details.

Sincerely,

RICHARD G. KLEINDIENST,
Attorney General.

Enclosure.

RESPONSE OF RICHARD G. KLEINDIENST, ATTORNEY GENERAL, TO SENATOR ERVIN'S
QUESTIONS

1. *Question:* In your prepared statement, you said, "The right of the Executive to withhold information from Congress and the courts is . . . well recognized," citing *United States v. Reynolds*. That case, as you mentioned, dealt with the production of documents in a tort action against the government. Do you know of any case in which the Supreme Court has recognized "the right of the Executive to withhold information from Congress"?

Answer: At the threshold, I should make it clear that *United States v. Reynolds*, 345 U.S. 1 (1953), was cited to support the second part of my statement, namely, that the Supreme Court has recognized the right of the Executive branch to withhold information from compulsory process of the Judicial branch. As I mentioned in my prepared statement, that right as it relates to the withholding of information from Congress has not been involved in the courts specifically. However, it has been covered under some general pronouncements of the Court regarding the authority of the Executive to withhold information. That the Supreme Court has not had the occasion to rule on the matter specifically, certainly suggests that the relationship between the executive and legislative branches throughout our history has not been that of conflict, but one of cooperation and moderation. Litigation has thus been avoided.

The Supreme Court has spoken of the prerogative, indeed the responsibility, of the Executive to preserve the confidentiality necessary to the discharge of its duties and functions; and the Court's language does not exempt Congress from the general authority of the Executive to withhold information in certain instances. In *United States v. Curtiss-Wright Export*, 299 U.S. 304, 319-320 (1936), the Court, in discussing what it described as "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations," recognized that "[s]ecrecy in respect of information gathered by [the President's confidential sources of information] may be highly necessary, and the premature disclosure of it productive of harmful results." And in *New York Times Co. v. United States*, 403 U.S. 713 (1971), Justice Stewart in a concurring opinion joined by Justice White said:

"It is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." *New York Times Co. v. United States*, 403 U.S. 713, 729-730 (1971).

The constitutional dimension of the authority of the Executive to maintain the privacy of information even under the mandate of a Congressional ordering was recognized in *Environmental Protection Agency v. Mink*, — U.S. —, 93 S. Ct. 827 (1973). Mr. Justice White, speaking for the Court, did not view the power of Congress to require the Executive branch to furnish documents to the public under the Freedom of Information Act, 5 U.S.C. § 552, as unbridled but instead said that "such congressional ordering" was subject to "whatever limitations the executive privilege may be held to impose. Cf. *United States v. Reynolds*, 345 U.S. 1 (1953)." 93 S. Ct. 834.

Thus while the Supreme Court has not had the occasion to rule directly on the scope of executive privilege in the context of a congressional demand for information, it has recognized the prerogative of the Executive to preserve the confidentiality of information necessary to the continuing discharge of its constitutionally conferred responsibilities and duties even where Congress may attempt to assert authority over the access to the documents in custody of the Executive branch.¹

1.(a). *Question*: If there is no Supreme Court case to that effect, is there any case from any Federal court recognizing such a "right"?

Answer: We have discussed several relevant Supreme Court cases and views of Justices in the answer to main question 1, *supra*, with regard to the nondisclosure authority of the Executive. We therefore interpret question 1(a) as asking whether additional support can be found in lower federal court cases. Although we are not aware of any square holding one way or the other, we do find support for the nondisclosure principle in *Soucie v. David*, 448 F. 2d 1067 (D.C. Cir. 1971). There the Court of Appeals considered the doctrine of executive privilege in the context of litigation under the Freedom of Information Act. Noting that "[t]he doctrine of Executive privilege is to some degree inherent in the constitutional requirement of separation of powers," the court pointed out that "the power of Congress to compel disclosure of agency records to the public is no greater than its power to compel disclosure to Congress itself." 448 F. 2d at 1071, n. 9. The Court of Appeals did not, however, rule on the issue whether the disclosure provisions of the Freedom of Information

¹ Often, the objection of the Executive is not to the furnishing of information to Members of Congress, but to the concomitant release of the information to all interested parties throughout the world. Some Members of Congress claim the right to determine not only what information should be furnished to Congress, but also whether that information once made available to it should be released to the public. This claim is inconsistent with the prerogative of the Executive "to protect the confidentiality necessary" to the effective discharge of its responsibilities and duties. *New York Times v. United States*, *supra*. See also *United States v. Curtiss-Wright Export Co.*, *supra*; Answer to Question 4, *infra*. In such circumstances, and at the level of speculation, the only effective recourse left to the Executive to guard against a possibly concomitant release of the information to all interested parties in derogation of its responsibilities would be to withhold the information.

Obviously, the power of Congress to compel disclosure to itself so that it, in turn, can release this information to the public, can be no greater than its power to accomplish this same result by compelling disclosure directly to all interested parties. Both avenues must be subject to the President's decision that the release of information would be incompatible with the discharge of Executive responsibilities and duties and therefore must be withheld. (See also Judge Wilkey's concurring opinion in *Soucie v. David*, discussed *infra* in 1(a)).

Act "exceed the constitutional power of Congress to control the actions of the Executive branch" because executive privilege, as so often is the case, was not invoked by the Government and therefore was not properly before the court. 448 F. 2d at 1072, 1071.

In a concurring opinion in *Soucie*, Judge Wilkey elaborated on the point of executive privilege because "on remand the trial court may . . . reach a question of constitutional privilege." 448 F. 2d at 1080. At the outset of his opinion, he noted that the privilege protecting the confidentiality of the decision-making process is "a tripartite privilege, because precisely the same privilege in conducting certain aspects of public business exists for the legislative and judicial branches as well as for the Executive." *Id.* "The constitutional privilege" against disclosure of deliberation of judges in conferences, of discussions in an Executive session of a Congressional committee, or a Cabinet meeting "arises from the principle of the separation of powers among the Legislative, Executive and Judicial branches of our government." 445 F. 2d at 1081.

Citing several instances where both the Executive and Legislative branches withheld information from another coordinate branch, Judge Wilkey addressed the issue concerning the power of Congress to compel the production of documents held in the possession of the Executive branch:

"If the exemptions to the Freedom of Information Act are found not to permit withholding of the information sought here, the Executive may still assert a constitutional privilege on the ground that Congress may not compel by statute disclosure of information which it would not be entitled to receive directly upon request.

* * * * *

"Obviously Congress could not surmount constitutional barriers—if such exist in this or any other given case—by conferring upon any member of the general public a right which Congress, neither individually nor collectively, possesses. Water does not naturally rise higher than its source." 448 F. 2d at 1082-83, 1081.

We do not know of any other lower federal court case discussing the question.

1(b). *Question:* If there are no cases, then who is it that recognizes such a right?

Answer: As indicated in our foregoing discussion, there is substantial judicial recognition of a general non-disclosure authority of the Executive in certain areas. Obviously, the courts do not and cannot resolve squarely every problem of the relative rights of the executive and legislative branches. The President cannot bring a judicial proceeding to challenge alleged usurpation by the Congress, nor can Congress sue to enjoin alleged usurpation by the President. These are political and not justiciable claims. See Henkin, *Foreign Affairs and the Constitution*, p. 208 (1972). But this does not mean that there is no such right. Practice is the most reliable touchstone.

In that respect, the right of the Executive to withhold information from Congress has been recognized not only by virtually every President but also by Congress itself and numerous commentators. Executive privilege is replete with historic precedents supporting the doctrine, which can properly be regarded as a practical interpretation of the Constitution. *See Answer to Question 3.*

Several instances of the refusals of the Executive to comply with congressional requests for information were discussed in my prepared statement. For a more complete survey of presidential refusals of information to the Congress, you may wish to refer to a study prepared by the American Law Division of the Library of Congress in 1955 and revised in May 1956, reprinted in *Freedom of Information and Secrecy in Government*, Hearing Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee on Constitutional Rights of the Senate Judiciary Committee on S. 921, 85th Cong., 2d Sess. pp. 428-446. A more recent survey prepared by a former Assistant Attorney General and an attorney in the Department of Justice be found in 29 Geo. Wash. L. Rev. 623, 827 (Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960*).

Congress itself has recognized by statute propriety of the doctrine of Executive privilege. Thus, section 634 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. § 2394(c)), provides for a cut-off of certain funds if requested information is not furnished to appropriate committees of Congress until there has been "a certification by the President that he has forbidden the furnishing thereof pursuant to request and his reason for so doing."

As early as 1807, the House passed a resolution acknowledging the right of the President, first considered by President Washington a few years earlier, to with-

hold from Congress information the disclosure of which would be inconsistent with the public interest:

"Resolved, That the President of the United States be, and he hereby is, requested to lay before this House any information in possession of the Executive, *except such as he may deem the public welfare to require not to be disclosed*, touching any illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any Power in amity with the United States; together with the measures which the Executive has pursued and proposed to take for suppressing or defeating the same. 16 Annals of Congress 336 (1806-1807) (Emphasis added)."

In 1879, the House Judiciary Committee spoke in general terms of the authority of the Executive to refuse to comply with a congressional demand for information:

"The Executive is as independent of either House of Congress as either House of Congress is independent of him, and they cannot call for the records of his actions, or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate. H. Rept. 141, 45th Cong., 3d Sess. 3-4 (1879)."

As I explained in my prepared statement, Congressional recognition of the power of the Executive to withhold information in the field of foreign relations is evidenced by the time-honored formula of resolutions of inquiry directed to the Department of State in matters of foreign relations. The resolutions request the Secretary to furnish the information "if not incompatible with the public interest." See Cannon's Procedure in the House of Representatives, H. Doc. 610, 87th Cong., 2d Sess., p. 219. In the Senate, this practice dates to the days of Daniel Webster. See, e.g., 38 Cong. Rec. 1307 (Sen. Collum). That the Executive would have the same power if that clause were missing has been conceded. See 40 Cong. Rec. 22 (1905) (Remarks of Senator Teller).

Congressional recognition of Executive privilege, of course, is not restricted to foreign relations. In 1906, Senator Spooner explained on the floor of the Senate that cases in which the President is authorized to withhold information from Congress were not limited to matters involving foreign relations but included among other matters military information which could be of use to unfriendly countries, and confidential investigations in the various departments of the government. 41 Cong. Rec. 97-98 (1906). More recently, in connection with the U-2 incident, the Senate Foreign Relations Committee recognized that with respect to intelligence operations:

"The administration has the legal right to refuse the information under the doctrine of Executive privilege." S. Rep. 1761, 86th Cong., 2d Sess., p. 22.

The authority of the Executive to withhold from Congress what may generically referred to as "investigative files," compiled by the Executive has also been recognized by Congress. During the Army-McCarthy hearings of 1954, the privileged nature of investigatory information was acknowledged in the ruling of Chairman Mundt:

"The Chair is prepared to rule. He unhesitatingly and unequivocally rules that in his opinion, and this is sustained by an unbroken precedent so far as he knows before Senate investigating committees, law-enforcement officers, investigators, any of those engaged in the investigations field, who come in contact with confidential information, are not required to disclose the source of their information. The same rule has been followed by the FBI and in my opinion very appropriately so." *Special Senate Investigation*, Hearing before the Special Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 83d Cong., 2d Sess., p. 770.

Congress has likewise recognized the validity of the claim of Executive privilege to protect the integrity of the decision-making process of the highest levels of government. Some examples of such recognition are adverted to in my prepared statement.

Finally, commentators writing on the doctrine of Executive privilege have recognized its constitutional basis. See, e.g., Berger, *Executive Privilege v. Congressional Inquiry* (Pts I & II), 12 U.C.L.A. L. Rev. 1043, 1287 (1965); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 Yale L.J. 477 (1957); Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 763-765 (1967); Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. Pitt. L. Rev. 755 (1959).

Whatever doubt may have existed at the founding of our nation because the Constitution does not deal directly with Executive privilege—as it does not deal directly with many other areas including the congressional power to investigate—has been resolved in favor of the validity of the privilege by a deeply embedded Executive practice, and an established congressional recognition of its propriety. The current issue is not over its existence but its scope.

2. *Question:* In your prepared statement, you indicate that "There is no authoritative court decision on Congressional power to compel production of documents or testimony on the part of members of the Executive branch." That being so, is it the position of the Department of Justice that the President can, under the Constitution, make final determinations as to the nature of the powers of his office? In this connection, you may desire to refer to the decision of the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which the Court invalidated President Truman's assertion of a power to seize the steel mills during the Korean conflict. Does this decision not stand for the principle that the actions of the President as Chief Executive are reviewable in the courts, with the ultimate decision to rest with the Supreme Court?

Answer: The answer depends on the particular situation involved. Parenthetically, by "authoritative court decision" in this context I mean, of course, as indicated in my foregoing answers, that there was no square holding on this point, not that there was a total absence of relevant judicial authoritative statements on Executive nondisclosure.

As indicated in my answer to question 1, 1(a), and 1(b), there are certainly powers of the President that are not subject to review by the courts or even by Congress. For example, under Article II of the Constitution, it is clear to me that neither the judicial nor the legislative branches can tell the President whom he shall nominate for office, whom he shall pardon, or whom he shall receive as ambassadors. Aside from the issues the Constitution textually commits to the executive branch for resolution, see *Baker v. Carr*, 369 U.S. 186, 217 (1962), there are issues that are not justiciable because of the delicate nature of the relationship of the three coordinate branches under the separation of powers principle. See *Powell v. McCormack*, 395 U.S. 486, 516-517 (1969). Likewise there are congressional powers which to date have been generally viewed exempt from either executive or judicial purview, e.g., matters arising from what is said on the floor of either House, *Gravel v. United States*, 408 U.S. 606 (1972), the power of impeachment and removal, the congressional choice of the method for ratification of constitutional amendments and all aspects of the amending process, *Coleman v. Miller*, 307 U.S. 433 (1939), and the determination whether a state form of government is republican in character, *Luther v. Borden*, 7 How. 1 (1949).

Subject to the limits of justiciability, the Supreme Court is empowered to declare an act of a coordinate branch of the government unconstitutional. It is a "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution. . . ." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). The decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), as you indicate in your question, is an application of this principle.

3. *Question:* Is it the position of the Department of Justice that constitutional law can be created by "prescription", that is, by practice (custom or usage) of either the Executive or the Legislative branches?

Answer: It is fundamental jurisprudence that law may be in constitutional or statutory form (positive law), or in unwritten form (the common law of judicial precedent and the customary law of constitutional or general practice). Valid positive law cannot be supplanted by a conflicting practice of the Executive branch or any other branch. However, absent any positive law on a given topic, the gap is filled by common law and customary practice, even at the constitutional level. As Justice Frankfurter said in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952), "[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them." Thus, while established practice cannot supersede the Constitution or a statute, they can "give meaning to the words of a text or supply them." *Id.*

Numerous Supreme Court cases recognize that the sanction of history goes far to establish the validity of a practice—even when the legitimacy of the practice may have been questioned in its origin. See, e.g., *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915). Of course, cases are legion which accord almost

decisive weight to a deeply embedded Executive interpretation of an ambiguous statute. See, e.g., *Boesche v. Udall*, 373 U.S. 472, 483 (1963). But as Justice Frankfurter observed in *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524-525 (1940), "[e]ven constitutional powers, when the text is doubtful, may be established by usage." See also *Pocket Veto Case*, 279 U.S. 655, 690 (1929). Where the constitutional distribution of powers is uncertain, action of the Executive that has crystallized into an established practice constitutes a gloss on the "executive Power" vested in the President, especially where the legitimacy of such action is acknowledged by the Congress.

4. *Question*: You used the term "the public interest" in your prepared remarks. By what criteria is "the public interest" determined by the Executive? Have any such criteria or standards of judgment ever been published or otherwise articulated? Further, is it the position of the Department of Justice that only the President can determine "the public interest"?

Answer: The term "the public interest" has been used as a generic phrase to characterize the circumstances under which Executive privilege may be invoked. The authority of the President to invoke Executive privilege necessarily requires the exercise of his judgment as to whether the disclosure of certain information would be contrary to the public interest. And of course public opinion exercised through the formal political process may be the ultimate arbiter.

Any actual exercise of judgment is likely to be a function of the imperatives of events and contemporary imponderables considered from the vantage of the Office of the President in the light of all available facts, rather than of abstract criteria or standards. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring opinion). It is possible, however, to examine the reasons underlying the claim of privilege in the primary areas in which it has been invoked to illustrate the considerations involved in determining whether the disclosure of the information requested was compatible with the public interest.

As I pointed out in my prepared statement Executive privilege has been pretty well confined to the areas of foreign relations, military affairs, law enforcement investigations, and intragovernmental discussions. The need for absolute secrecy for certain information falling within the first two categories has been recognized by the judicial branch on several occasions. See, e.g., *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936); *United States v. Reynolds*, 345 U.S. 1, 8 (1953). Recently in *New York Times v. United States*, 403 U.S. 713, 728 (1971), Mr. Justice Stewart stated in his concurring opinion:

"Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident."

Of course it is only in rare cases—indeed very rare cases—where the secrecy of the information is of such gravity that the matter must be withheld from Congress to guarantee the successful discharge of the Executive's responsibility in the areas of foreign affairs and national defense. As Professor Bishop has argued, information may be of such sensitivity that it must be withheld because "in the heat of partisan passion" the public interest as viewed by the President may run "a very poor second to considerations of faction." Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 Yale L.J. 477, 486 (1957). Professor Bishop cites as an example the disclosure during World War II by Senator Burton K. Wheeler of "the Navy's occupation of Iceland while the operation was still in progress and the ships vulnerable to attack by submarines," ostensibly because the Senator was an "extreme isolationist." *Id.* at n. 41.

Executive privilege has also been invoked to promote frank, impartial and disinterested advice within the Executive branch. Advisers may well tend to hedge or blur the substance of their opinions if they feel that they will shortly be second-guessed either by Congress, by the press, or by the public at large, or that the President may be embarrassed if he would have to explain why he did not follow their recommendations. "Experience seems to teach that a sounder end result—which will be the fullest object of public scrutiny—will be reached

if the process of reaching it is not conducted in a goldfish bowl." Statement of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, 92d Cong., 1st Sess., p. 420.

Judge Wilkey, concurring in *Soucie v. David*, 448 F. 2d 1067, 1080-81 (D.C. Cir. 1971), recently discussed the rationale of the privilege against disclosure of the decision-making process as it applies to all three branches:

"Historically, and apart from the Constitution, the privilege against public disclosure or disclosure to other coequal branches of the Government arises from the common sense-common law principle that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.

"No doubt all of us at times have wished that we might have been able to sit in and listen to the deliberation of judges in conference, to an executive session of a Congressional committee or to a Cabinet meeting in order to find out the basis for a particular action or decision. However, Government could not function if it was permissible to go behind judicial, legislative or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility."

Finally, the Executive has determined in several instances to withhold from Congress what may generically be referred to as "investigative files" compiled by the Executive branch in taking care that the laws be faithfully executed. The principal reasons underlying the claim that congressional or public access to investigatory files would not be in the public interest were outlined in Attorney General Jackson's Opinion of April 30, 1941, 40 Op. A.G. 45, refusing to comply with the request of Chairman Carl Vinson of the House Naval Affairs Committee for certain investigative reports of the Federal Bureau of Investigation.

As I said in my prepared statement, the refusal by Attorney General Jackson of the Committee's request was based on the considerations that the disclosure of such information could seriously prejudice law enforcement, by allowing a prospective defendant to know how much or how little information the government had about him, and what witnesses or sources of information it was proposing to rely upon. In addition, the Opinion cited the serious prejudice to the future usefulness of the government's information-gathering agencies, since much of the information was (and is) given in confidence and can only be obtained upon a pledge not to disclose the source. Finally, Attorney General Jackson said that disclosure "might also be the grossest kind of injustice to innocent individuals," since the reports included "leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that the correction never catches up with an accusation." 40 Op. A.G. at 47.

This review of the reasons underlying the claim of Executive privilege illustrate some of the considerations to be explored in any case where the invocation of the privilege is contemplated. Practice indicates that the initial inquiry is whether the request for information falls into one of the four main categories listed above. Thereafter, standards of judgment as to the degree of adverse effect on the "public interest" of a disclosure are not mechanistic. Rather, each case must be considered on its own merits and in the light of a circumspection imbued with the awareness that any claim of privilege is met with suspicion and adverse inferences that often cannot be rebutted by the Executive without disclosing the very information the privilege is designed to protect.

It is not, of course, the position of the Department of Justice that the President has a monopoly in determining "the public interest." Members of Congress are expected to act in the public interest and, *a fortiori*, must consider the course that best furthers the national interest from their standpoint. This is one of the several areas where the separation of powers principle builds the seeds of conflict into our system, and necessitates a spirit of negotiation and accommodation.

Hence, Executive privilege is not invoked casually. Where Executive privilege is invoked, however, it is our position that the determination whether the privilege is appropriately asserted in a given case is a matter for the Executive, not the Congress, absent appropriate judicial rulings. This position is as well established in principle as precedent.

As a matter of constitutional law, the ultimate determination must be vested in the Executive. Under the principal of separation of powers, no branch may subordinate the other and dictate the discharge of the responsibilities and duties constitutionally committed to another branch. The President, as Chief Executive, bears ultimate responsibility for "taking care that the laws are faithfully executed" and is vested with the constitutional obligation of supervising the operations of that branch. It would be bad constitutional law not to associate responsibility with power. As Justice Stewart said in *New York Times v. United States*, 403 U.S. 713, 728 (1971), "[t]he responsibility must be where the power is."

The independence of each branch from the control over the documents of another branch was considered in *Hearst v. Black*, 87 F. 2d 68 (D.C. App. 1936). In refusing to enjoin the Congress from retaining, making use of, or disclosing certain information, the court observed:

"If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others." 87 F. 2d at 72.

As *Hearst* indicates, Congress has retained for itself the decision concerning what documents in its custody may be disclosed. No court subpoena is complied with by the Congress, its members or its committees without a vote of the house involved authorizing the disclosure voluntarily of documents in response to the request of the court. For example, H.R. Res. 427, 81st Cong., 2d Sess., provided:

"[N]o evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission." 96 Cong. Rec. 565-66 (1951).

See also Senate Rule XXX.

As a practical matter, concurrent authority over the claim of privilege would defeat it because the determination can be made only with the knowledge of what the information is in fact. Nothing that "in contemplation of law, under our theory of government, all records of the executive departments are under the control of the President of the United States," the House Judiciary Committee in 1879 recognized that the President must be the final arbiter of this decision:

"Somebody must judge upon this point. It clearly cannot be the House or the committee, because they cannot know the importance of having the doings of the executive departments kept secret. The head of the executive departments, therefore, must be the judge in such case and decide it upon his own responsibility to the people. * * *" H.R. Rept. 141, 45th Cong., 3d Sess. 3-4 (1879).

President Thomas Jefferson reached the same conclusion when he responded to the subpoena duces tecum approved by Chief Justice Marshall in the *Burr* case:

"Reserving the necessary right of the president of the United States to decide, independently of all other authority, what papers coming to him as president the public interest permits to be communicated, and to who, I assure you of my readiness, under that restriction, voluntarily to furnish on all occasions whatever the purposes of justice may require. *United States v. Burr*, 25 Fed. Cas. (No. 14,693) 55, 65." (Emphasis added.)

The authority of the President to make the final determination on this point has been recognized by Congressmen on several occasions. In 1905, Senator Teller said that if the President decides the furnishing of information "is incompatible with the public interest, it is his right so to state to the Senate, and the Senate has always bowed to such a suggestion from the Executive." Again in 1906, Senator Bacon of Georgia, strongly arguing for the privileges of the Senate in a debate with Senator Spooner of Wisconsin who sided with the Administration, made the following statements:

"Mr. BACON. * * *

"Of course, I recognize the fact that the question of the President's sending or refusing to send any communication to the Senate is a matter not to be judged

by legal right, but a question which has always been recognized as one of courtesy between the President and this body, and which the *Senate*—except, perhaps, in the case in which the Senator took a very notable part and to which I have had occasion heretofore to allude—*has always yielded to the judgment of the President in the matter and has never made an issue with him about it.*

* * * * *

"Mr. SPOONER. I am talking upon the principle. The Senator says "legal right" or "legal duty." I admit that we have a right to pass resolutions calling for any information from the President; but does the Senator say it is the legal duty of the President to send it?

"Mr. BACON. I do not dispute the fact that there may be occasions when the President would not.

"Mr. SPOONER. *Who is the judge?*

"Mr. BACON. *The President, undoubtedly.* Nobody has ever controverted that; and the very resolution concerning which the Senator is animadverting was expressly conditioned upon the President viewing the transmission of the information requested as being compatible with the public interest." 40 Cong. Rec. 2142. (Emphasis supplied.)

Finally, Congress itself has recognized by statute the authority of the President to finally determine whether the claim of privilege is appropriate. Thus, Section 634(c) of the Foreign Assistance Act of 1961 (22 U.S.C. § 2394(c)) provides that documents may be withheld from Congress if the President so certifies and gives the reason for his certification.

5. *Question:* In answer to a question by Senator Chiles, you stated, in effect, that the second part of the "necessary and proper" clause of the Constitution (Article I, Section 8, Clause 18) would not be construed by the Supreme Court to validate a Congressional statute requiring testimony from officers of the Executive Branch. Please cite cases in which the Supreme Court has so held, or has held that Congress cannot legislate the metes and bounds of the activities of members of the Executive branch.

Answer: Article I, Section 8, Clause 18 of the Constitution provides that Congress shall have the power "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (Emphasis added.) This clause is not a "delegation of a new and independent Power." *Kansas v. Colorado*, 206 U.S. 46, 88 (1907). Instead, it grants to Congress the power to select any means reasonably adapted "for carrying into Execution" the expressed powers. By its terms, it is thus a clause of implementation. It empowers Congress not to abrogate the powers expressly vested in the Government "or in any Department or officer thereof" but to implement those powers.

In interpreting the necessary and proper clause, Chief Justice Marshall, in his classic opinion in *McCulloch v. Maryland*, 4 Wheat. 316, 420 (1819), reiterated the general principle that constitutionally granted powers must be read in the light of other powers conferred by the Constitution and with reference to the overall intention of the Framers:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

"A reading of the necessary and proper clause that empowered Congress to legislate "the metes and bounds" of every activity of officials of the Executive branch would run afoul of the doctrine of separation of powers for it would transform our government of checks and balances into a parliamentary system where the legislature would control the acts of Executive officials, and through them, the acts of the President. In *Kilbourn v. Thompson*, 103 U.S. 168 (1881), the Supreme Court stated the principle that action by one branch which threatens the orderly and independent operation of a co-equal branch violates the doctrine of separation of powers:

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative and the judicial. . . . It is . . . essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise

of the powers appropriate to its own department and no other." 103 U.S. 190-191.

See also *United States v. Klein*, 13 Wall. 128 (1871) (Congress cannot limit the effects of a Presidential amnesty because the power of pardon is intrusted to the Executive alone); *Myers v. United States*, 272 U.S. 52 (1926) (Statute that required the consent of the Senate in removing certain executive officials held unconstitutional because it encroached on the Chief Executive's duty, and on the power of the President to direct those subordinates whose discretion he was entitled by the Constitution to control so that he could discharge his responsibility of taking care that the laws be faithfully executed.)

While Executive departments and agencies are creatures of statute, the officials staffing those entities are not totally under the control of the Legislative branch. As the Supreme Court said in *Kendall v. United States*, 12 Pet. 524, 610 (1838), "there are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president." Chief Justice Marshall expressed the same principle in *Marbury v. Madison*, 1 Cranch 137, 164 (1803):

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which Executive discretion may be used, still there exists and can exist no power to control that discretion."

The President's "executive Power" together with his duty to "take Care that the Laws be faithfully executed" commit to him the power, indeed the responsibility, to take such action that will ensure that he can effectively discharge his duties. Executive privilege, as almost all Presidents have had the occasion to recognize, see Answer to Question 1(b), is a manifestation of this responsibility. Congress cannot, under the necessary and proper clause, abrogate the power that is incident to this responsibility.

6. Question: Does not your view of Article I, Section 8, Clause 18, render the latter part of that clause mere surplusage? Can you demonstrate to the Congress any provision of the Constitution that has been rendered a nullity by the Supreme Court?

Answer: As I pointed out in response to Question 5, the necessary and proper clause empowers Congress to *implement* the powers expressly granted by the Constitution. Thus, a statute based on that clause which implements rather than abrogates or otherwise impairs the ability of the President to discharge the responsibilities vested in him by Article II would not run afoul of the separation of powers principle and, assuming no other provision of the Constitution were violated, would be constitutional. My view of the necessary and proper clause, therefore, does not "render it mere surplusage".

Of course, there is no case where the Supreme Court has attempted in terms to declare unconstitutional a provision of the Constitution. It is well recognized, however, that there are constitutional provisions that are not judicially enforceable. For example, the Constitution provides that a state "shall" surrender up a fugitive from justice in another state, but the Supreme Court's decision that neither the Judiciary nor Congress can compel the Governor to deliver up the fugitive has made rendition discretionary rather than mandatory. *Kentucky v. Dennison*, 24 How. 66 (1861). And for years, until 1962, the Supreme Court refused to entertain pleas that population malapportionment in setting up legislative districts or in using county unit systems, violated either Article I, Section 2 or the Fourteenth or Sixteenth Amendments of the Constitution. See *Colegrove v. Green*, 328 U.S. 549 (1946); *South v. Peters*, 339 U.S. 276 (1950).²

² Throughout our history, people have claimed that certain provisions of the Constitution have been "nullified" by the Supreme Court, in whole or in application to particular circumstances. What provisions have been nullified depend on the definition of nullity and on the perspective of the commentator. For example, the 96 Members of Congress who signed the Declaration of Constitutional Principles in March, 1956, claimed that the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), was "a clear abuse of judicial power" that ran contrary to established law and the Constitution and encroached upon the rights constitutionally reserved to the states and the people, while the preliminary version of Declaration called the court ruling "illegal and unconstitutional." *New York Times*, March 12, 1956, p. 1, col. 2.

7. *Question:* What is the legal basis for your assertion, in your response to questioning by Senator Muskie, that the President could validly refuse to permit any employee of the Executive branch to testify before Congress?

Answer: The doctrine of Executive privilege is designed not to protect any particular person but to protect information the disclosure of which would impair the integrity of the decision-making process or otherwise be contrary to the public interest. Thus, the President must be empowered to invoke the privilege on behalf of any Executive official or employee who has possession of the information—whether that individual be a Presidential adviser, agency head, secretary or clerk. The same information that is protected when written by a Cabinet member must remain protected even though prepared with the assistance of a staff member, typed by a secretary or carried by a messenger. It would, indeed, be a hollow privilege that protected information in the possession of an Executive official but did not protect the identical information held by individuals who assisted the official in the performance of his duties. It is noteworthy that several pieces of legislation introduced in this session of Congress, which purport to regulate the invocation of Executive privilege provide that the privilege may be asserted on behalf of any employee of the Executive branch. *See* S. 858 (introduced by Senator Fulbright); S.J. Res. 27 (introduced by Senator Ervin).

There is no case directly on point. However, in *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959), the Supreme Court recognized the need to apply the protection of the privilege which immunizes an Executive official from a suit for libel involving official utterances beyond the highest government officials to those who, in fact, are performing, or assisting in performing executive functions. In immunizing the Acting Director of the Office of Rent Stabilization from liability for an alleged libel contained in a press release, the Court held that the privilege recognized in prior cases could not be restricted to those of Cabinet rank. As Mr. Justice Harlan said, in speaking for the Court:

"We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy."

A most instructive analogy is provided in *Gravel v. United States*, 408 U.S. 606 (1972). That case involved motions by a United States Senator to quash a grand jury subpoena requiring his assistant to appear as a witness in connection with the alleged theft, and the consequent transmittal and public disclosure, of top secret documents known as the "Pentagon Papers". The Supreme Court held that the privilege that extends to Members of Congress immunizing even criminal acts within the ambit of protection of the Speech or Debate Clause of the Constitution, Article I, Section 6, applies equally to the Members' aides. 408 U.S. at 618-622. *Cf. Kilbourn v. Thompson*, 13 Otto 168 (1880); *Dombroski v. Eastland*, 387 U.S. 82 (1967); *Powell v. McCormack*, 395 U.S. 486 (1969). The Court reasoned that congressional employees or officers who assist Members of Congress in performing incidental functions necessary to accomplish fully the legislative task must be protected by the Legislative privilege in order to protect the integrity of the legislative process. 408 U.S. at 622, n. 13. The same principle applies equally to the invocation of Executive privilege.

Recognizing that a privilege is effective only if it can be asserted by or on behalf of all those in possession of the information the privilege is designed to protect, the Senate has limited the scope of a response of a Senator as well as Senatorial employees to a judicial subpoena for documents in the possession of the Senate, its committees or subcommittees. By Senate Resolution 307, 87th Cong., 2d Sess., the Senate prohibited two former staff members—an assistant counsel and an investigator—of a Senate Select Committee to Investigate Improper Activities in Labor-Management Relations and the general counsel of the Permanent Subcommittee on Investigations from testifying to information they gained while in such employ and furnishing any documents or records in the custody of the Senate:

"Resolved, That by the privileges of the Senate of the United States no evidence under the control and in the possession of the Senate of the United States can,

by the mandate of process of the ordinary courts of justice, be taken from such control or possession, but by its permission; be it further

* * * * *

"Resolved, That by the privilege of the Senate and by rule XXX thereof, no Member or Senate employee is authorized to produce Senate documents but by order of the Senate; and information secured by Senate staff employees pursuant to their official duties as employees of the Senate may not be revealed without the consent of the Senate . . ." 108 Cong. Rec. S 3626-27 (1962). (Emphasis supplied.)

Further explaining the basis of the resolution, Senator McClellan pointed out: "The Senate recognizes it has certain privileges as a separate and distinct branch of the Government, which it wishes to protect." 108 Cong. 3627 (1962)..

The application of Executive privilege to the employee of the Executive branch who is in possession of information the privilege protects, whatever his title, is merely a manifestation of this same principle.

S. Question: What is the legal basis for the Presidential assertion that "Executive privilege" attaches to individuals who served in the White House but who have left to return to private life?

Answer: To my knowledge, a President has never had the occasion to make Executive privilege to protect information in the possession of former members of the Presidential staff. However, President Harry S. Truman, relying upon the principle of separation of powers which is also the basis of the doctrine of Executive privilege, declined to comply with a subpoena served on him after he left office by the House Committee on Un-American Activities. In a letter to the Committee dated November 12, 1953, Mr. Truman cited precedents in which incumbent Presidents had declined to reply to subpoenas or demands for information by Congress and applied these precedents to a demand to a former President for information pertaining to the performance of his official duties:

"It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President.

"The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes." *New York Times*, November 13, 1953, p. 14.

The Committee did not attempt to press the matter to a test, and in a radio speech dealing with the subject, Mr. Truman stated:

"The separation and balance of powers between the three independent branches of the Government is fundamental in our constitutional form of government. A Congressional committee may not compel the attendance of a President of the United States, while he is in office, to inquire into matters pertaining to the performance of his official duties. If the constitutional principle were otherwise, the office of the President would not be independent.

"It is just as important to the independence of the Executive that the actions of the President should not be subjected to the questioning by the Congress after he has completed his term of office as that his actions should not be questioned while he is serving as President. In either case, the office of President would be dominated by the Congress and the Presidency might become a mere appendage of Congress." *New York Times*, November 17, 1953, p. 26.

Just as the doctrine of separation of powers and the independence of the Presidency would be undermined if a former President were subject to examination concerning his acts occurring while he was President, so would it be undermined if former advisers of the incumbent or former President were subject to a congressional inquiry into those same acts. The purpose of Executive privilege as applied to advice given the President by his staff is to ensure that the President receives frank, impartial and disinterested advice. It accomplishes this purpose by preserving the confidentiality of that advice. The integrity of the decision-making process at this very high level of our Government would be compromised if Presidential advisers hedged their opinions, or even remained silent because they knew that their advice would soon be examined out of context by Congress, the press and the public, or that the President may have to explain why he did not follow it.

To protect the advice from a staff member from congressional and public scrutiny only for so long as the staff member remained employed in the White House,

would substantially undermine the purpose for which the privilege obtains. It would only be a question of time, of which all—the advisers, Congress and the public—would be cognizant, when turnovers or a change of administration would remove the protection afforded by the privilege. Moreover, to confine the privilege to officials still serving as Presidential staff members would permit a committee to compel testimony from former staff members that could certainly be refused if sought from a current staff member. Such a narrow conception of the doctrine of Executive privilege would subvert the privilege and disregard the imperatives of the decisionmaking process.

That the candor and detachment necessary to promote discussion designed to elicit the truth and reveal the core of matters in question would be undermined if the confidentiality of the discussion were not protected beyond the termination of a relationship that forged a privilege has been recognized under the law of evidentiary privileges for communications to an attorney, a spouse, or a physician. It is well settled, for example, that the privileged status of communications between attorney and client continues after the end of the litigation or the occasion for legal advice, and even after the death of the client or the death of the attorney (*Wigmore on Evidence*, 3d ed. § 2323), that the privilege which attaches to communications between husband and wife continues after death or divorce (*Wigmore, op. cit.* § 2341), and that the privilege incident to the relationship between physician and patient continues even after the termination of the relationship. (*Wigmore, Op. cit.* § 2387). The privilege, whether it be Executive or evidentiary, must on principle continue after the cessation of the confidential relationship in which the privilege is predicated, for the fundamental conditions which give rise to the privilege do not terminate with the relationship.

8(a). *Question:* Does that assertion of privilege attach also to individuals who were on the staffs of other Presidents (for example, President Lyndon Johnson)? If not, why not? If so, under what legal theory can one President assert a privilege for members of the staffs of other Presidents?

Answer: Because the doctrine of Executive privilege is premised on the separation of powers, it is a privilege that belongs to the Executive branch and can only be invoked on behalf of Presidential Assistants who served either the former or incumbent President by the head of that branch, that is to say, the incumbent President. By Section 1 of Article II of the Constitution, the President is vested with the Executive power. It is his obligation to preserve and protect both the independence and viability of that Office. In the discharge of this constitutional responsibility, the President must determine whether the furnishing of the information or testimony would undermine the Executive role. And it is only the President who can make this decision because he is the only one who can marshal all the relevant facts and place them in the context of the imperatives required in the effective discharge of the constitutional functions vested in the Executive branch.

Executive privilege is not lightly or rigidly invoked. It often is not asserted, even when it might be, in the interest of providing the Legislative branch with information relevant to the discharge of its Legislative function. Thus, the decision as to whether to invoke the privilege depends on the exigencies of events and judgments of the projected effect that furnishing the information would have on the functioning of the Executive branch, all determinations which only the President can make as Chief Executive.

9. *Question:* 5 United States Code, Sec. 2954, reads as follows: "An Executive agency on request of the Committee on Government Operations of the House of Representatives, or any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee."

What is the position of the Department of Justice on the constitutionality of that statute? Give reasons for your answer.

Answer: While the language of section 2954 is quite broad, its legislative history indicates that its actual scope is rather narrow and that it was not enacted to assert a sweeping right of Congress to obtain any information it might desire from the Executive branch in abrogation of the constitutional authority of the President to withhold information the disclosure of which would be incompatible with the public interest.

Section 2954 of Title 5, United States Code, is derived from section 2 of the act of May 29, 1928, 45 Stat. 996, Section 1 of that act provided for the repeal of legislation which required the submission of some 128 reports to Congress, many of which either had become obsolete or served no useful purpose. Section

2—which has been reenacted as 5 U.S.C. 2954—was designed to enable Congress to obtain, if needed, the information theretofore contained in the discontinued reports. The pertinent House report thus states—

“...to save any question of the House of Representatives to have furnished to it any of the information contained in the reports proposed to be abolished, a provision has been added to the bill requiring such information to be furnished to the Committee on Expenditures in the Executive Departments or upon the request of any seven members thereof.” H. Rept. No. 1757 70th Cong., 1st Sess., p. 6.

The Senate report is to the same effect:

“This section makes it possible to require any report discontinued by the language of this bill to be resubmitted to either House upon its necessity becoming evident to the membership of either body.” S. Rept. No. 1320, 70th Cong., 1st Sess., p. 4.

The legislative history of the act from which 5 U.S.C. 2954 is derived thus indicates that its purpose was to serve as a vehicle for obtaining information theretofore embodied in the annual routine reports to Congress submitted by the several agencies. It does not purport to compel the officials of the Executive branch, or indeed the President, to furnish to Congress information the disclosure of which the President believes would impair the proper exercise of his constitutional functions.

So read, we do not believe that the statute conflicts with the constitutional prerogative of the President to withhold from the Congress, information and documents the disclosure of which he determines would not comport with the public interest. Accordingly, we perceive no constitutional infirmities in 5 U.S.C. § 2954.

10. *Question:* Comptroller General Staats testified that the General Accounting Office was refused certain information concerning tax-paid flights made by Government aircraft last year, the stated reason being “executive privilege” invoked by Mr. John W. Dean, Counsel to the President.

Set out in detail the legal basis for refusing those records to the General Accounting Office. In your reply, indicate why, as Mr. Staats testified, passenger lists “for all White House flights, even those not flown by the presidential crew” were considered to be “personal to the President.” Does not this position logically mean that everything that happens in the White House, or is done by anyone employed in the White House, is personal to the President? If not, where is the line drawn between activities “personal to the President” and those that are not?

Answer: Initially, I should point out that Mr. Dean did not invoke Executive privilege in refusing to furnish the General Accounting Office with information concerning flights made in September 1972 by the President and his family, the Vice-President, White House staff, and Cabinet officers in aircraft assigned to the 89th Military Aircraft Wing, Andrews Air Force Base, Maryland. Instead authority for the denial of this request for the information can be found in 3 U.S.C. § 103 which provides that sums appropriated to the President for traveling expenses are “to be expended in the discretion of the President and accounted for on his certificate solely.”

This statute reflects a courteous recognition by Congress that this information has traditionally been considered personal to the President. Thus, GAO does not have jurisdiction to investigate the travel expenses of the President. See 3 U.S.C. § 103; 31 U.S.C. § 53(b). It is for this reason that its request for this information was not complied with.

The fact that “everything that happens in the White House” is not considered as personal to the President is demonstrated in the same letter Mr. Dean sent to Comptroller General Staats denying access to the information concerning traveling expenses. In that letter, a copy of which is attached, Mr. Dean informed the Comptroller General that the account records for the Executive Office of the President for the period of fiscal year 1969 to the present were available for review by the General Accounting Office.

As I pointed out in my testimony and in my answer to Question 4, *supra*, Executive privilege is invoked to withhold only that information the disclosure of which would be contrary to the public interest. The doctrine is not designed to protect any particular person or any particular activity. Thus, in response to your last inquiry in Question 10, there cannot, *a fortiori*, be any line-drawing on the basis of these factors.

EXECUTIVE PRIVILEGE

PART 3—CONGRESSIONAL REPORTS AND RESEARCH

THE PRESENT LIMITS OF "EXECUTIVE PRIVILEGE"

(The Library of Congress—Congressional Research Service)

(A Study Prepared Under the Guidance of the House Foreign Operations and Government Information Subcommittee, by Samuel J. Archibald, Consultant, Government Information Policy, Government and General Research Division, and Harold C. Relyea, Analyst, American National Government and Public Administration, Government and General Research Division, March 20, 1973)

May 17, 1954, was an important day on Capitol Hill. On that day, two separate political battles shifted emphasis, and the new emphasis of each controversy still is causing political problems.

In the Supreme Court Building Chief Justice Earl Warren issued the court's unanimous decision in *Brown v. Board of Education* holding that separate education is not equal education. In the Senate Office Building John Adams, the Army's general counsel, delivered a copy of a letter from President Dwight D. Eisenhower to Secretary of Defense Charles Wilson directing the Secretary to tell all his subordinates not to testify about advisory communications during the hearings of a special subcommittee of the Senate Government Operations Committee.¹

Both important developments of May 17, 1954, had roots deep in the history of the United States. In the future both would effect the political development of the nation. The results of the Supreme Court's school desegregation decision are widely discussed in popular literature and scholarly studies and have become a part of current history. But there is comparatively little current knowledge about the developments that flowed from President Eisenhower's May 17, 1954, letter. Possibly, that letter and the political conflict of which it is part are more important to the study of the American form of democratic government with three branches than is the widely studied school desegregation issue.

President Eisenhower's May 17, 1954, letter brought a new dimension to the interactions between the Legislative and Executive Branches of the Federal government which are part of our separate-but-coordinate system. His letter, and its accompanying memorandum purporting to list historic examples of Presidential assertion of the right of "executive privilege," became the basis for an extension of the claim of "executive privilege" far down the administrative line from the President.² Eight years later there was an attempt to bring "executive privilege" back into proper perspective, but the effort has not been a complete success even though it involved three Presidents.

There are many privileges exercised by the executive head of the United States Government, ranging from the free use of the mountain retreat at Camp David (or Shang-gri-la as President Franklin D. Roosevelt christened it) to a funeral with full military honors. But the "executive privilege" has come to mean a claim of authority to control government information.³ This "executive

¹ U.S. Congress, Senate, Committee on Government Operations, Special Subcommittee on Investigations, *Special Senate Investigation on Charges and Countercharges Involving: Secretary of the Army Robert T. Stevens, John G. Adams, H. Struve Hensel and Senator Joe McCarthy, Roy M. Cohn, and Francis P. Carr*. Hearings, 83rd Congress, 2d session, Washington: U.S. Govt. Print. Off., 1954, pp. 1169-1172.

² H. Rept. 84-2947, p. 90

³ H. Rept. 86-2084, p. 37.

privilege" to control the dissemination of information has been asserted against the public⁴ and against the courts,⁵ but the claim of an "executive privilege" which was the basis of the President's May 17, 1954, letter is the claim of authority to withhold information from the Legislative Branch of the Federal government. And the authority claimed in President Eisenhower's May 17, 1954, letter extended throughout the Executive Branch to include agencies administered by persons appointed by the President with the advice and consent of the U.S. Senate. This claim of control over government information is in addition to the power exercised by Presidents to protect their immediate White House staff—their personal advisers, in effect, over whose appointment the Congress has no confirming power.

THE SEPARATION OF POWERS AND THE CONTROL OF INFORMATION

The conflict between the Legislative and Executive Branches of the Federal government over access to information begins with the first clause of the first section of the first article of the Constitution of the United States. Article I, Section 1 states that "all legislative Powers herein granted shall be vested in a Congress of the United States . . ." The power to legislate carries with it the power to investigate⁶ and the clash between the executive and the legislature over access to information almost always has occurred in connection with a Congressional investigation.

In fact, the earliest attempt by the Congress to investigate brought on a conflict over the authority of the executive to withhold information. The House of Representatives in 1792 appointed a committee to investigate General St. Clair's military disaster in the Northwest and empowered the committee to "call for such persons, papers, and records, as may be necessary to assist their inquiries."⁷ This demand for information by the first Congress and the reaction to it by the first President was brought up 162 years later in connection with President Eisenhower's letter of May 17, 1954. A memorandum from the Attorney General which accompanied the letter listed the call for information in the St. Clair caper as the first example of Presidential assertion of "executive privilege."⁸ The memorandum states that President Washington called a Cabinet meeting and the group decided that "neither the committee nor House had a right to call upon the head of a Department who and whose papers were under the President alone."⁹

Not only did this first Congressional investigation result in a confrontation over legislative access to Executive Branch information but it also provided a vehicle for the first major factual error in the memorandum accompanying the May 17, 1954, letter, discussing what has come to be called "executive privilege." Far from being an example of Presidential assertion of "executive privilege", the St. Clair episode was an example of Congress effectively asserting its right of access to information. A Cabinet meeting was held and the question of Presidential power over records was discussed, as reported in the memorandum, but the full text of Thomas Jefferson's notes of that meeting shows that it was decided "there was not a paper which might not be properly produced."¹⁰ In fact, an historian-newsman who analyzed the precedents listed in the memorandum for withholding information from the Congress concluded that, in most of the examples, "the Congress prevailed, and got precisely what it sought to get."¹¹

⁴ *Ibid.*, p. 36.

⁵ *Marbury v. Madison* (1 Cranch 137) and the conspiracy trial of Aaron Burr are the classic historical cases. *Kilbourn v. Thompson* (103 U.S. 168), *McGrain v. Daugherty* (273 U.S. 135), *ex rel. Touhy v. Ragan* (340 U.S. 462) and *U.S. v. Reynolds* (345 U.S. 1) are modern cases which have considered court access to Executive Branch information. When President John F. Kennedy limited the use of "executive privilege" to the President alone (see below), he was asked by the Attorney General whether the limitation applied only to congressional requests for information. Theodore C. Sorenson, Special Counsel to the President, replied in a letter of March 30, 1962, to the Attorney General that the policy "relates solely to inquiries directed by the Congress or its committees to the Executive Branch" and does not have any application to "demands, made in the course of a judicial or other adjudicatory proceeding, for the production of papers or other information in the possession of the Government."

⁶ Library of Congress, Legislative Reference Service, *The Constitution of the United States of America—Analysis and Interpretation*. Washington: U.S. Govt. Print. Off., 1964, p. 105.

⁷ *Ibid.*

⁸ U.S. Congress, House, Committee on Government Operations, Special Subcommittee on Government Information, *Availability of Information from Federal Departments and Agencies*. Hearings, 85th Congress, 2d session. Washington: U.S. Govt. Print. Off., 1958, p. 2911.

⁹ *Ibid.*

¹⁰ J. Russell Wiggins, "Government Operations and the Public's Right to Know," *Federal Bar Journal*, XIX (January, 1959), p. 76.

¹¹ *Ibid.*, p. 82.

The assertion of an "executive privilege" to withhold information from the legislature is rooted in the opening words of Article II of the Constitution: "The executive power shall be vested in a President of the United States of America" and in the last clause in Section 3 of Article II: "He shall take care that the laws be faithfully executed."¹²

This Constitutional grant of power is both vague and complicated, the language raising more questions of how the power shall be exercised than it answers.¹³ In the past 18 years, however, there have been some major changes in Congressional-Executive relationships which clarify the practice—if not the principle—of "executive privilege".

THE RECENT GROWTH OF "EXECUTIVE PRIVILEGE"

After May 17, 1954, the Executive Branch answer to nearly every question about the authority to withhold information from the Congress was "yes", they had the authority. And the authority most often cited was the May 17, 1954, letter from President Eisenhower to Secretary of Defense Wilson.¹⁴ Not only was the letter cited, but usually the claim of authority included the accompanying memorandum from Attorney General Herbert Brownell, supposedly prepared in the Department of Justice.

The letter and the memorandum were involved in a controversy between Senator Joseph McCarthy (R., Wis.) and the United States Army over the propriety of the Senator's pressure tactics as chairman of the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations. During two days of testimony at special hearings called to give McCarthy and the Army a forum for their fight, Army Counsel John Adams mentioned a meeting in the Attorney General's office attended by top White House staff members.¹⁵

When Subcommittee members tried to get more information from Adams about what went on at the high-level meeting, Joseph N. Welch of Boston, the Army's special counsel for the Army-McCarthy hearings, said Adams had been instructed not to testify any further about the meeting.¹⁶ That was on Friday, May 14, 1954. When Subcommittee members insisted that Adams testify, Welch asked for and was granted a recess until the following Monday.

On Monday, Adams gave the Subcommittee the letter of instructions from the President to the Secretary of Defense, accompanied by a memorandum supposedly prepared officially in the Department of Justice over the weekend. In fact, the memorandum consisted only of excerpts and paraphrases from a 1949 article printed in the *Federal Bar Journal* and written by Herman Wolkinson, a Justice Department research lawyer.¹⁷ Two years later the Justice Department presented to another Congressional subcommittee what appeared to be an expanded memorandum supporting their position on "executive privilege",¹⁸ but it was merely the text of the Wolkinson article.¹⁹

There was a favorable public response to President Eisenhower's firm stand against disclosing conversations in his official family. Newspapers which were

¹² Senator Sam Ervin (D-N.C.), the United States Senate's acknowledged constitutional expert, explains:

"Although the Constitution is silent with regard to the existence of executive privilege, its exercise is asserted to be an inherent power of the President. Its constitutional basis allegedly derives from the duty imposed upon the President under article II section 3 to see that the laws are faithfully executed. The President claims the power on the grounds that it is necessary in order to provide the executive branch with the autonomy needed to discharge its duties properly. Inasmuch as the 'President alone and unaided could not execute the laws * * *' but requires 'the assistance of subordinates' (*Myers v. U.S.*, 272 U.S. 117 (1926)), the alleged authority to exercise executive privilege has thereby been extended in practice to the entire executive branch."

*U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Separation of Powers, *Executive Privilege: The Withholding of Information by the Executive*. Hearings, 92nd Congress, 1st session Washington: U.S. Govt. Print. Off., 1971, p. 2.

¹³ Edward S. Corwin, *The President: Office and Powers*. New York: New York University Press, 1968, pp. 4 and 5.

¹⁴ H. Rept. 86-2084, p. 177.

¹⁵ U.S. Congress, Senate, Committee on Government Operations, Special Subcommittee on Investigations, *op. cit.*, p. 1059.

¹⁶ *Ibid.*, pp. 1169-1172.

¹⁷ H. Rept. 86-234, p. 64, note 1.

¹⁸ U.S. Congress, House, Committee on Government Operations, Special Subcommittee on Government Information, *op. cit.*, p. 2894; another, modified version and the original also found in U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Constitutional Rights *Freedom of Information and Secrecy in Government*. Hearings, 85th Congress, 2d session, Washington: U.S. Govt. Print. Off., pp. 63-270.

¹⁹ Herman Wolkinson, "Demands of Congressional Committees for Executive Papers," *Federal Bar Journal*, X (April, July, October, 1949), pp. 103-150, 223-259, 319-350.

later to inveigh against the excesses of "executive privilege" praised the President's letter of May 17, 1954. The *New York Times*, for instance, editorialized against Senator McCarthy's use of legislative powers to encroach upon the Executive Branch "in complete disregard of the historic and Constitutional division of powers that is basic to the American system of Government."²⁰ And the *Washington Post* called the memorandum which was made public in connection with the President's letter "an extremely useful document," concluding that the President's authority under the Constitution to withhold information from Congress "is altogether beyond question."²¹

But the May 17, 1954, letter from the President, with its accompanying memorandum, soon became the major vehicle for spreading a claim of Presidential authority throughout the Executive Branch. The letter referred only to a specific series of conversations between Presidential appointees, restricting access to information about those conversations only to one specific Subcommittee of the Congress. Four months later, however the May 17, 1954, letter was extended to cover more than the President's personal appointees and more than the specific Subcommittee's hearings.

In August, 1954, the U.S. Senate established a select committee to determine whether Senator McCarthy was guilty of conduct "unbecoming a member of the United States Senate" and asked two Army generals to testify about their conversations in connection with McCarthy's activities. Major General Kirke B. Lawton refused to testify on the advice of counsel that the May 17, 1954, "directive" applies to "this or any other" committee.²² Senator Arthur V. Watkins (R. Utah), the chairman of the select committee, asked Secretary of Defense Charles Wilson for clarification and received a letter stating:

"As a matter of legal application, the Attorney General advises me that the principles of the Presidential order of May 17, 1954 are as completely applicable to any committee as they were to the Committee on Government Operations."²³

Telford Taylor, in his study of Congressional investigatory powers at the time of the Army-McCarthy controversy, commented:

"If President Eisenhower's [May 17, 1954] directive were applied generally in line with its literal and sweeping language, congressional committees would frequently be shut off from access to documents to which they are clearly entitled. . . . It is unlikely, therefore, that this ruling will endure beyond the particular controversy that precipitated it."²⁴

He proved a poor prophet, in this case. President Eisenhower's May 17, 1954, letter became the major authority cited for the exercise of "executive privilege" to refuse information to the Congress for the next seven years of his administration²⁵ and it established a pattern which the three Presidents after Eisenhower have followed.

"EXECUTIVE PRIVILEGE" LIMITED

President John F. Kennedy bent, although he did not break, the pattern of "executive privilege" claims by officials far down the administrative line from the President. He had been in office for one year when a special Senate subcommittee held hearings on the Defense Department's system for editing speeches of military leaders. When the Subcommittee asked the identity of the military editors who had handled specific speeches, President Kennedy wrote a letter to Secretary of Defense Robert S. McNamara directing him and all personnel under his jurisdiction "not to give any testimony or produce any documents which would disclose such information."²⁶ The similarity of President Kennedy's letter of February 8, 1962, and President Eisenhower's letter of May 17, 1954, stopped there, for Kennedy added:

"The principle which is at stake here cannot be automatically applied to every request for information. Each case must be judged on its own merits."²⁷

²⁰ *New York Times*, May 18, 1954, p. 28.

²¹ *Washington Post*, May 18, 1954, p. 14.

²² U.S. Congress, Senate, Select Committee to Study Censure Charges Against Senator Joe McCarthy, *Hearings, Select Committee to Study Censure Charges Against Senator Joe McCarthy, August 31 through September 17, 1954*, 83rd Congress, 2d session. Washington: U.S. Govt. Print. Off., 1954, p. 167.

²³ *Ibid.*, p. 434.

²⁴ Telford Taylor, *Grand Inquest*. New York: Simon & Schuster, 1955, p. 133.

²⁵ H. Rept 86-2084, p. 177.

²⁶ U.S. Congress, Senate, Committee on Armed Services, Special Preparedness Subcommittee, *Military Cold War Education and Speech Review Policies*. Hearings, 87th Congress, 2d session. Washington: U.S. Govt. Print. Off., 1962, pp. 508 and 509.

²⁷ *Ibid.*

There was no legal memorandum attached to President Kennedy's letter, although one was available. A 169-page study of "executive privilege" cases through 1960 had been prepared by two lawyers in the Department of Justice and printed in two issues of the *George Washington Law Review*.²⁸ The study, reminiscent of Herman Wolkinson's article in the *Federal Bar Journal* which was used as the back-up memorandum for President Eisenhower's May 17, 1954, letter, discussed executive responses to legislative inquiries from 1953 through 1960 and described some of the cases in which "executive privilege" was claimed. The new study called the exercise of "executive privilege" awkward and embarrassing—but not improper—and concluded:

"This power, like most other Presidential powers, therefore, must be delegated to other officials. The question is how far down the administrative line can this delegation proceed."²⁹

President Kennedy's answer was: it cannot. His position was clarified in an exchange of correspondence with Congressman John E. Moss (D., Calif.) who, as chairman of the Foreign Operations and Government Information Subcommittee and its predecessor special subcommittee, had been leading the fight against government secrecy for nearly six years. Moss wrote that President Kennedy's letter of February 8, 1962, "clearly stated that the principle involved could not be applied automatically to restrict information", but he urged clarification "to prevent the rash of restrictions on government information which followed the May 17, 1954, letter from President Eisenhower."³⁰ President Kennedy, whose staff had gone over a draft of the Moss letter before it was sent formally, replied on March 7, 1962:

"Executive privilege can be invoked only by the President and will not be used without specific Presidential approval."³¹

Soon after Lyndon B. Johnson was elected President, Congressman Moss asked him to limit the use of "executive privilege" as had President Kennedy. In a letter of March 31, 1965, Moss discussed the spread of the use of "executive privilege" following President Eisenhower's letter and contended that, as a result of President Kennedy's limitation of the use of the authority, "there was no longer a rash of 'executive privilege' claims to withhold information from the Congress and the public." Moss expressed to President Johnson the hope that "you will reaffirm the principle that 'executive privilege' can be invoked by you alone and will not be used without your specific approval."³² President Johnson, in a letter of April 2, 1965, to Congress Moss, reaffirmed the principle, stating flatly that "the claim of 'executive privilege' will continue to be made only by the President."³³

Congressman Moss repeated the procedure soon after President Richard M. Nixon took office, asking him to "favorably consider a reaffirmation of the policy which provides, in essence, that the claim of 'executive privilege' will be invoked only by the President."³⁴ Two months after receiving the letter from Congressman Moss, President Nixon issued a memorandum to the heads of all executive departments and agencies stating that "executive privilege will not be used without specific Presidential approval." He buttressed his memorandum with a letter to Congressman Moss stating:

"I believe, as I have stated earlier, that the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific Presidential approval."³⁵

President Nixon's memorandum of March 24, 1969, spelled out procedural steps to govern the invocation of "executive privilege." First, he stated, anyone who wanted to invoke "executive privilege" in answer to a request for information from a "Congressional agency" had to consult the Attorney General. If the Attorney General and the department head agreed that "executive privilege" should not be invoked, the information requested should be released to the Congress. If, however, either or both of them wanted the issue submitted to the President, "the matter shall be transmitted to the Counsel to the President, who will ad-

²⁸ Robert Kramer and Herman Marcuse, "Executive Privilege—A Study of the Period 1953–1960," *George Washington Law Review*, XXIX (April, June, 1961), pp. 623–718, S27–916.

²⁹ *Ibid.*, p. 911.

³⁰ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. *op. cit.*, p. 34.

³¹ *Ibid.*

³² *Ibid.*, p. 35.

³³ *Ibid.*

³⁴ *Ibid.*, p. 36.

³⁵ *Ibid.*

wise the department head of the President's decision." If the President decided to invoke "executive privilege," the memorandum concluded, "the department head should advise the Congressional agency that the claim of Executive privilege is being made with the specific approval of the President."³⁰

This was the first time that a step-by-step procedure was set up for invoking "executive privilege" against Congressional inquiries. It was not, of course, the first time that a President had promised to make the final decisions on the use of "executive privilege," but neither was President Kennedy's decision that only he should refuse information to the Congress a Presidential first. On April 14, 1909, President William H. Taft issued Executive Order 1062 stating:

"In all cases where, by resolution of the Senate or House of Representatives, a head of a Department is called upon to furnish information, he is hereby directed to comply with such resolution, except when, in his judgment, it would be incompatible with the public interest, in which case he should refer the matter to the President for his direction."

No information is available on the results of President Taft's Executive Order 1062, but there is information from public sources on the results of the Kennedy-Johnson-Nixon limitation of the use of "executive privilege."

THE LIMITS OF LIMITATION

Has the Executive Branch claim of power to refuse information to Congress been severely limited since President Kennedy exercised "executive privilege" but said it would be used only by the President, judging each case on its merits? To answer the question, public sources were researched from 1962 through 1972 to determine the instances in which the Executive Branch refused documents or testimony to Congressional committees. The instances of "executive privilege" covered might or might not involve the issuance of a subpoena or a formal resolution requesting information. What has been focused upon is a publicly-recorded request for information by a Congressional committee and a publicly-reported refusal by an Executive Branch official to grant that request. That which was sought might be a document, a witness, or both. The refusal may or may not have been accompanied by a reason for the denial. The invocation of "executive privilege" has been interpreted for the purposes of this study to refer to a refusal of information to Congressional committee or subcommittee by an Executive Branch agency or official. It does *not* include instances in which Presidential aides, serving in the White House Office, have refused to appear before Congressional committees.

Sources used in this study were the *New York Times*, the *Washington Post*, the *Washington Evening Star*, the *Congressional Record*, the *Congressional Quarterly* reports and almanacs, and printed hearings of Congressional committees. Following is the result:

Kennedy Administration

Exercise of "executive privilege" by the President

1. State and Defense Department witnesses directed not to give testimony or produce documents at hearings of the Senate Special Preparedness Subcommittee on Military Cold War Education which would identify individuals who reviewed specific speeches. (Committee on Armed Services, United States Senate, *Military Cold War Education and Speech Review Policies*, 87th Congress, Second Session, pp. 338, 369-370, 508-509, 725, 730-731 and 826).

Refusals by Executive Departments and Agencies to provide documents or testimony

1. The Food and Drug Administration refuses to comply with a request from the House Interstate and Foreign Commerce Committee for files on MER-29 drug (*New York Times*, 6/21/62).

2. The State Department refuses to provide a copy of a working paper on the "mellowing" of the Soviet Union to the Senate Foreign Relations Committee (*New York Times*, 6/27/62).

3. General Maxwell D. Taylor appears before the House Subcommittee on Defense Appropriations and refuses to discuss the Bay of Pigs invasion as "it would

³⁰ *Ibid.*, p. 37.

result in another highly controversial, divisive public discussion among branches of our Government which would be damaging to all parties concerned." (*Congressional Record*, 4/4/63, p. 5817).

Johnson Administration

Refusals by Executive Departments and Agencies to provide documents or testimony

1. The Department of Defense refuses (April 4, 1968) to supply a copy of the Command Control Study of the Gulf of Tonkin incident to the Senate Foreign Relations Committee (Committee on the Judiciary, United States Senate, *Executive Privilege: The Withholding of Information by the Executive*, 92nd Congress, First Session, p. 39). This source hereafter cited as Senate Judiciary Committee hearings, *Executive Privilege*.

2. Treasury Under Secretary Joseph W. Barr refuses to testify before Senate Judiciary Committee on the nomination of Abe Forias to be Chief Justice (*Congressional Record*, 9/18/68, p. 27518 and *Washington Post*, 9/17/68).

Nixon Administration

Exercise of "executive privilege" by the President

1. The Attorney General refuses (November 21, 1970) to give Congressman L. H. Fountain, chairman of the Intergovernmental Relations Subcommittee of the House Government Operations Committee, reports furnished by the Federal Bureau of Investigation to evaluate scientists nominated to serve on advisory boards of the Department of Health, Education and Welfare (Committee on Government Operations, U.S. House of Representatives, *U.S. Government Information Policies and Practices—The Pentagon Papers*, Part 2, 92nd Congress, First Session, pp. 362-363).

2. The Department of Defense refuses (August 30, 1971) to supply foreign military assistance plans to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 45-46).

3. The State Department refuses (March 15, 1972) to give the House Foreign Operations and Government Information Subcommittee the Agency for International Development country field submissions for Cambodian foreign assistance for the fiscal year 1973 (*New York Times*, 3/17/72); *Congressional Record*, 3/16/72, pp. H2148-H2149).

4. The United States Information Agency refuses (March 15, 1972) to give the Senate Foreign Relations Committee all USA Country Program Memoranda (*Congressional Record*, 3/16/72, pp. H2148-H2149).

Refusals by Executive Departments and Agencies to provide documents or testimony

1. The Department of Defense refuses (June 26, 1969) to supply the five-year plan for military assistance programs to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, p. 40).

2. The Defense Department refuses to provide a copy of "Commitment Plan 1964" between U.S. and Thailand to the Senate Foreign Relations Committee (*New York Times*, 8/9/69).

3. The Department of Defense refuses (December 20, 1969) to supply the "Pentagon Papers" to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 37-38).

4. Secretary of Defense Melvin Laird declines invitation to appear before Senate (Foreign Relations) Disarmament Subcommittee (*New York Times*, 3/19/70).

5. Department of Defense General Counsel J. Fred Buzhardt refuses in hearings (March 2, 1971) to release an Army investigation report on the 113th Intelligence Group requested by Senate Constitutional Rights Subcommittee (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 402-405).

6. The Department of Defense refuses (April 10, 1971) to supply continuous monthly reports on military operations in Southeast Asia to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, p. 47).

7. The Department of Defense refuses (April 19, 1971) to allow three designated generals to appear before the Senate Constitutional Rights Subcommittee (Senate Judiciary Committee hearings, *Executive Privilege*, p. 402).

8. The Department of Defense refuses (June 9, 1971) to release computerized surveillance records and refuses to agree to a Senate Constitutional Rights Subcommittee report on such records (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 398-399).

9. The State Department refuses (March 20, 1972) to supply Senate Foreign Relations Committee with a copy of "Negotiations, 1964-1968: The Half-Hearted Search for Peace in Vietnam" (*Washington Post*, 3/20/72).

10. Treasury Secretary John Connally refuses to testify before Joint Economic Committee on matter of the Emergency Loan Guarantee Board refusing to supply requested records on the Lockheed loan to the Government Accounting Office (*Washington Evening Star*, 4/27/72).

11. Benjamin Forman, Department of Defense Assistant General Counsel, appears before the Senate Foreign Relations Committee but refuses to discuss weather modification efforts in Southeast Asia (*Washington Post*, 7/27/72).

12. Henry Ramirez, chairman of Cabinet Committee on Opportunities for the Spanish Speaking, refuses to testify before House Judiciary Subcommittee on Civil Rights (*Congressional Quarterly*, 8/12/72, p. 2017).

13. SEC Chairman William J. Casey refuses to turn over Commission investigative files on ITT to the House Interstate and Foreign Commerce investigative subcommittee (*Washington Evening Star/Daily News*, 11/1/72).

14. HUD Secretary George Romney declines invitation to appear before the Joint Economic Committee to testify on Federal housing subsidies (*Washington Post*, 12/6/72).

15. Department of Defense refuses to turn over documents requested by the House Armed Services Committee on unauthorized bombing raids of interest to the committee as part of hearings on the firings of Gen. John D. Lavelle (*Washington Post*, 12/19/72).

CONCLUSIONS

President Kennedy exercised the Presidential claim of "executive privilege" one time when he directed witnesses not to identify speech reviewers in testimony before the Senate subcommittee investigating military cold war education policies. Six separate refusals to provide information to the subcommittee were involved in the President's single action.

After the Kennedy directive, however, Executive Branch officials in his administration refused to provide information to Congressional committees three times, apparently without Presidential authority.

In the Johnson Administration "executive privilege" was not claimed by President Johnson, but there were two refusals by appointees in his administration to provide information to Congressional committees after President Johnson's letter of April 2, 1965, stating that "the claim of 'executive privilege' will continue to be made by the President."

President Nixon personally and formally invoked the claim of "executive privilege" against Congressional committees four times after his memorandum of March 25, 1969, stating that "executive privilege" will not be used without specific Presidential approval. After the memorandum was issued there were, however, 15 other instances in the Nixon Administration in which documents or testimony were refused to Congressional committees without Presidential approval.

This public record of the controversies over Congressional access to Executive information after three Presidents limited the use of "executive privilege", raises a number of questions. Were the Executive Branch officials who apparently refused information to Congressional committees 20 times in violation of the orders of three Presidents, actually acting under orders? Is it possible that three Presidents ordered information withheld 20 times from Congressional committees and left no evidence of their orders?

Contrariwise, is it possible that, in 20 instances, Executive Branch officials were ignoring the clear orders of three Presidents? Or possibly, is there some of both: Executive Branch officials refusing information to Congressional committees with the tacit understanding—at least by the White House staff if not the President, himself—of what was going on?

There are many other problems which can be raised in addition to these three alternatives, such as the question of what formal action the Congress or one of its constituent units must take to assert the Legislative Branch's right of access to information implied by the Constitution, and the question of whether the Legislative vs. Executive conflict over access to government information may be regarded as a partisan political fight having little to do with the evolution of a system of government based on three coordinate branches.

The fact that there is much more conflict over Congressional access to Executive Branch information when the two branches are controlled by different political parties gives substance to the view that "executive privilege" is a partisan problem. There were, for example, 19 cases of refusal of information to Congressional committees under the first four years of the Republican Nixon Administration working with a Democratic Congress, but there were only six refusals of information in seven years of the Kennedy and Johnson Administrations when both branches were controlled by the same political party. An additional indication of the partisan nature of the conflict is that there were some 34 instances of information refused in response to Congressional requests during the last five years of the Eisenhower Administration, after he issued his letter of May 17, 1954.³⁷ In that period, the Executive and Legislative Branches were under control of different political parties.

Partisan the problem is, but not purely partisan. It can come up when both branches are under control of the same political party—witness the six cases in the Kennedy and Johnson Administrations—and the partisan makeup of the two branches may merely sharpen the conflict and not make it less of a problem to be solved as the governmental system evolves.

President Nixon, in fact, did more to regularize the flow of information to Congress on controversial subjects than did his predecessors. He issued the first orders setting up a step-by-step procedure to be followed in his administration before "executive privilege" could be invoked. And his memorandum of March 24, 1969, moved toward an answer to the question of what type of formal action the Congress must take to demand information before "executive privilege" would be asserted.

His memorandum referred throughout to a "Congressional agency"³⁸ requesting Executive Branch information. By this language, apparently he was recognizing that a Congressional committee or subcommittee—or, possibly, the chairman of either—could make a formal request for information that might result in the claim of "executive privilege". He did not require a resolution of the House or Senate, as did President Taft, nor did he leave the problem completely in limbo, as did Presidents Kennedy and Johnson.

There is some additional information to indicate which of three alternatives—violation of a Presidential order, secret Presidential approval or both—explain the fact that the limitation on the use of "executive privilege" apparently has been ignored. It is possible that the five cases in the Kennedy and Johnson Administrations in which information was refused, apparently without Presidential approval, in fact had Presidential approval but this fact has been kept from public knowledge.

This is not the case in the Nixon Administration. President Nixon's memorandum requires a potential "executive privilege" case to go through the Office of Legal Counsel in the Department of Justice. The "executive privilege" expert in that office is Herman Marcuse, one of the authors of the *George Washington Law Review* study of "executive privilege" from 1953 to 1960 (see footnote 28). Marcuse has stated that only the cases of "executive privilege" listed above were handled in the office and approved by President Nixon since his memorandum.³⁹

There is a possibility that, in all three administrations, the cases of refusal of information to Congress, apparently in violation of Presidential orders, did not result from formal confrontations between the two branches of government. Assistant Attorney General William H. Rehnquist, who was in charge of the Office of Legal Counsel, testified after two years' experience under President Nixon's "executive privilege" memorandum that "agencies which seek to withhold information are complying with the procedures set forth in the memorandum."⁴⁰ By the time of his testimony, there already had been one formal Presidential use of the claim of "executive privilege" and eight other cases in which, public records show, testimony or documents had been refused to Congressional committees.

³⁷ H. Rept. 86-2084, pp. 5-35.

³⁸ U.S. Congress. Senate Committee on the Judiciary. Subcommittee on Separation of Powers. *op. cit.*, p. 36.

³⁹ Telephone interview, August 22, 1972.

⁴⁰ U.S. Congress. House. Committee on Government Operations. Foreign Operations and Government Information Subcommittee. *U.S. Government Information Policies and Practices—The Pentagon Papers*. Hearings, 92nd Congress, 1st session Washington: U.S. Govt. Printing Office, 1971, p. 365.

Rehnquist downgraded refusals of information to Congress which had not had the stamp of Presidential approval, arguing that no real confrontation over access to information occurs in many cases because they are mere discussions at the staff level between Executive agencies and Congressional committees. And in other cases, he testified, a witness would mention the possibility that a request for particular information might raise the spectre of "executive privilege." Rehnquist added:

"But such a statement, of course, is by no means tantamount to the President's authorizing the claim of privilege. It is simply a statement by a department head or his representative that he is prepared to recommend a claim of privilege to the President should the demand for information not be settled in a mutually satisfactory manner to both the agency and the chairman of the committee or subcommittee involved."⁴¹

None of the 15 Nixon Administration cases of refusal of information to a Congressional committee without the formal, Presidential citation of "executive privilege" seems to fit the Rehnquist criteria. While the committees or subcommittees involved may not have taken a formal vote to demand the testimony or documents in each case, the request for information did come up in hearings or as part of a formal request from the chairman.

If the 15 Nixon Administration cases involved formal, direct requests for information and if there are no secret Presidential orders directing the invocation of "executive privilege", it seems that Executive Branch officials violated the Presidential directive 15 times. When interpreting orders in government administration, however, one bureaucrat's violation may be another bureaucrat's compliance. Those who want to withhold information from the Congress will do everything possible to make it difficult for Congress to get what it needs. That is apparent from the 34 instances occurring in five years when the Executive Branch wrapped itself in President Eisenhower's letter of May 17, 1954, as a cloak of "executive privilege". That cloak no longer exists, but the bureaucracy that used it is little changed. And the top-level policy makers apparently are happy to use the bureaucracy's tactics of delay and obfuscation to prevent Congress from getting at information which might embarrass their agency or their administration.

While the Kennedy-Johnson-Nixon statements limiting the invocation of "executive privilege" may state clearly to Congressional readers that information will not be refused without specific Presidential approval, they may also state to Executive Branch readers that they should be careful when claiming "executive privilege" but they can use other techniques to block Congressional access to information.

Thus, the use of the claim of "executive privilege" has been severely limited but the limitation has not opened new file drawers to Congress. In fact, the Presidential statements have been limitations in name only.

⁴¹ *Ibid.*, p. 366.

[COMMITTEE PRINT]

84TH CONGRESS }
2d Session }

HOUSE OF REPRESENTATIVES

THE RIGHT OF CONGRESS TO OBTAIN
INFORMATION FROM THE EXECUTIVE
AND FROM OTHER AGENCIES OF THE
FEDERAL GOVERNMENT

STUDY BY THE STAFF
OF THE
COMMITTEE ON GOVERNMENT
OPERATIONS



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PREFACE

This analysis of law has been prepared by the Staff of the House Committee on Government Operations. It is especially timely because a Subcommittee of this Committee—the Special Subcommittee on Government Information—has been holding hearings and studying various aspects of the right of the people to know what their Government is doing.

One very important phase of this inquiry has to do with the right of Congress to obtain information from Federal agencies.

Studies have hitherto been made of the right of the Congress to obtain, and of the executive to withhold, information. Often these studies have been done in an atmosphere surcharged with the heat of controversy. Often they have borne the tell-tale flush of advocacy. It is suggested that this analysis represents a cool detachment remote from intragovernmental turmoil. It is believed that it presents precedent and authority not hitherto available.

This is one of a series of studies of legal questions germane to the work of the committee.

This particular study is limited to a consideration of the right of Congress to obtain information from Federal agencies, department heads, and their subordinates and the judicial determination of this right. While the study is limited to this field of inquiry it does not purport to cover numerous other phases the discussion of which would in no way alter the conclusions drawn.

[COMMITTEE PRINT]

THE RIGHT OF CONGRESS TO OBTAIN INFORMATION FROM THE EXECUTIVE AND FROM OTHER AGENCIES OF THE FEDERAL GOVERNMENT

I. GENERAL RELATIONSHIP OF LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS UNDER THE CONSTITUTION

Ours is a government of laws. Law in the Federal structure consists of the Constitution, the laws enacted by the Congress, and the body of law incorporated in judicial interpretation.

The Constitution contains an enumeration, in specific and general terms, of the powers of the Federal Government. Three classes or categories of powers are recognized by the Constitution—legislative, executive, and judicial. Legislative power is vested in the Congress by article I. The executive power is vested in the President by article II. Judicial power is vested by article III in one Supreme Court and such inferior courts as Congress shall establish from time to time.

The Constitution creates no branches in the Federal Government. Nevertheless, because of the separation of powers and checks and balances, characteristic of our system of government, a usage has arisen of the term “branches” in the Federal Government. While this form of reference has its conveniences it should not obscure the fact that in law it is the nature of the functions that is significant and in the broad sense determinative.

Under the Constitution the President is given certain specific powers and duties and charged to

* * * take Care that the Laws be faithfully executed (art. II, sec. 3).

Thus the Congress enacts the laws and the President carries them out. Each of these, however, receives its basic authority directly from the Constitution and in the long run is politically responsible to the people at election time. Short of the action of the electorate, the Chief Executive is subject to impeachment by the House and trial by the Senate. But the judgment in cases of impeachment cannot extend further than to removal from office and disqualification to hold any other office under the United States (art. I).

While the Congress has the constitutional authority to remove the President by impeachment and trial, each House of the Congress is the judge of the elections, rights, and qualifications of its own Members; may punish its Members for disorderly behavior; and may expell a Member by a two-thirds vote (art. I, sec. 5).

The classic summation of the separation of powers is set out in these propositions by Montesquieu as stated by Professor Corwin: (1) There are three intrinsically distinct functions of government, the legislative, the executive, and the judicial; (2) these distinct functions

ought to be exercised respectively by three separately manned departments of government; which (3) should be constitutionally equal and mutually independent.

Congruous with this doctrine the Constitution has vested certain specific powers in the Congress, in the President, and in the Supreme Court and such inferior courts as Congress may ordain and establish. Furthermore, the Constitution seems to frown upon an official who holds office in more than one branch at the same time. This is spelled out so far as Congress is concerned in article I, section 6, as follows:

* * * no Person holding any Office under the United States shall be a Member of either House during his Continuance of Office.

It is thus impossible for a situation to exist here such as does in Britain where a Cabinet officer sits in Parliament.

Nevertheless, John Marshall, who became Chief Justice of the Supreme Court January 31, 1801, continued to act as Secretary of State until March 4 of that year.

The Constitution, however, seems to contemplate a separation of powers involving certain qualifications: (1) The assignment of certain powers preponderantly and/or ultimately to one branch, e. g., legislation can be enacted over the President's veto; (2) cooperation between the branches, e. g., treaty-making power, certain appointments; (3) restrictions on the ability of one branch ultimately to control completely another branch, e. g., restrictions on dual office holding (art. I, sec. 6); the appointing power is exercised by the President subject to the advice and consent of the Senate and further subject to the vesting of the appointment of inferior officers in the courts of law or in the heads of departments by act of Congress (art. II, sec. 2).

The separation of powers involves cooperation between the legislative, executive, and judicial branches. After all this is how our Government operates. This cooperation is shaped or influenced by an adjustment or accommodation of powers and actions between the branches. It is part of the genius of our system that conflict between the branches is usually symptomatic of some special unrest or grievance in the body politic.

In the course of such contests between the branches probably no problem has been more frequently recurrent in our Government or more important to the safeguarding of democracy than that of access to information in the possession of departments and agencies of the Federal Government. Such information is not only vital to the public directly but it is especially important to the Congress which legislates and explores the administration of Federal activities.

There is guidance in the past as to the extent to which the Executive, the Congress, and the judiciary have taken a position in regard to the availability of Government information. There is also information on how far each branch has asserted its prerogatives. While there is indication that no test of ultimate authority has ever taken place between the branches, there is enough precedent to furnish a basis for drawing conclusions of law. It is, therefore, of value to summarize briefly developments as they have taken place in order to find where we stand today in regard to the right of the Congress to information in the possession of Government agencies.¹

¹ In making this review some light necessarily will be shed on the rights of members of the public.

II. THE FEDERAL STRUCTURE OUTSIDE THE CONGRESS AND THE JUDICIARY—THE RELATIONSHIP OF THE PRESIDENT AND THE INDEPENDENT REGULATORY AGENCIES

The right of Congress to information from the Federal departments and agencies also involves the nature of the Federal departments and agencies. Are all Federal agencies executive agencies? To what extent are they subject to the control of the President as the head of the executive branch?

A large number of agencies have been created over the years. The Congress has created "executive departments" and "independent agencies" in the exercise of its powers under the "necessary and proper" clause (art. I, sec. 8). From time to time agencies have been created by Executive order. In the course of this proliferation of agencies the so-called independent agencies, i. e., those outside the executive departments, have outnumbered the departments themselves.

Terminology has grown along with the growth in the numbers of agencies. Terms have been used interchangeably thereby causing some confusion as to their precise meanings. For example, the term "independent agency" has a number of meanings and such words as "board" or "commission" have been used in connection with dissimilar agencies.

In addition, the confusion over terms has clouded the fact that the nature of functions performed is determinative rather than the name of any particular agency. Amidst this uncertainty as to nomenclature there has been a substantial usage of terms such as "quasi-legislative" and "quasi-judicial" to describe legislative and judicial functions respectively which have been vested by the Congress in various agencies of the Government. At times these functions have been vested in executive departments or subdivisions thereof. In more recent years a number of separate agencies have been created by Congress to perform legislative and judicial functions. Since such agencies have been created to regulate various parts of the economy they have come to be called "independent regulatory agencies." Following this usage the terms "independent regulatory agency," "quasi-legislative," and "quasi-judicial" are used in this analysis as a matter of convenience.

The Constitution itself does not classify agencies. It is concerned with powers and duties. Article II, section 1, states simply:

The Executive Power shall be vested in a President of the United States of America.

The structure of the Executive is not further defined. The Constitution does contemplate the creation of departments in the executive branch. Article II, section 2, states that the President—

* * * may require the Opinion, in writing, of the principal Officer in each of the executive Departments * * *

The same part of the Constitution permits the vesting of the appointment power "* * * in the Heads of Departments." But significantly enough the Constitution makes the President's appointing power subject to the advice and consent of the Senate and provides

that the Congress may, by law, vest the appointment of officers not specifically provided in the Constitution “* * * in the President alone in the Courts of Law or in the Heads of Department.” Thus the Constitution gives the Congress authority in certain cases to specify and limit the appointing power.

Students of government have argued pro and con about the location of Federal agencies in the constitutional structure. One point of view would place all agencies in the executive branch except for a few of direct service to the Congress, such as the General Accounting Office and the Government Printing Office. The Executive Office of the President, through the Bureau of the Budget, represents this point of view. Others have argued to the contrary that certain agencies, particularly the regulatory agencies, exercise quasi-legislative and quasi-judicial powers and are outside the executive branch. This point of view has been fortified by the opinion of the Supreme Court in the Humphrey case.²

The opposite viewpoints as to the organizational location of the regulatory agencies and their functions both tend to deal with the substance of the issue in terms of mechanics. Professor Cushman has pointed out that it is unnecessary to locate the functions involved in one branch exclusively. His opinion is that the functions overlap all three.³ Professor Cushman appears to be closer to the heart of the matter than those who argue whether this or that agency is in the executive branch of the Government. *The real point is whether Congress can vest certain functions by law and provide for their administration partially or wholly exempted from the direct control and influence of the President.* The answer, as summarized in the Humphrey case, would appear to be that Congress can do so.

What has caused the partisans of the Chief Executive to be doctrinaire about locating agencies in the executive branch is the board language in the Humphrey case which is characterized by such passages as the following:

* * * much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

Such a body (the Federal Trade Commission) cannot in any proper sense be characterized as an arm or an eye of the Executive.

* * * it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the Government.

* * * Its coercive influence threatens the independence of a commission which is not only wholly disconnected from the executive department, but which * * * was created by Congress * * * as an agency of the legislative and judicial departments.

This language also has led to an approach claiming organizational independence from the Chief Executive. The dispute has obscured the significant part of the Humphrey opinion. The important holding of the Humphrey case is that in the case of a quasi-legislative or quasi-

² *Rothbun v. U.S.*, 295 U.S. 602 (1935).

³ Cushman, Robert E., *The Independent Regulatory Commissions*, Oxford University Press, 1911, particularly ch. VI, *The Constitutional Status of the Independent Regulatory Commissions*. See also Professor Cushman's earlier articles on the constitutional status of the independent regulatory commissions in *Cornell Law Quarterly*, vol. XXIV, at pp. 13 and 163.

judicial function the Congress may, if it wishes, vest the function so as to insure its performance without direct control by the President. This is stated in the following sentence from the Humphrey opinion which has oftentimes been overlooked in the heat of the organizational argument:

The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted * * *

Students of government know that Congress may do this or may entrust the same type of functions to a cabinet officer. Professor Cushman refers repeatedly to the administration of the Packers and Stockyards Act by the Secretary of Agriculture as a case in point. But it should be noted that the function of the agency is determinative of its classification and control. In *Federal Power Commission v. Colorado Interstate Gas Co.* (350 U.S. 467, 472), the Supreme Court, for example, held that—

the Federal Power Commission is an administrative agency the decisions of which involve those difficult problems of policy, accounting, economics, and special knowledge that go into public-utility ratemaking.

Consequently the Court held that certain of the Commission's decisions, being legislative, were not subject to judicial determination by the court of appeals.

The Humphrey case has established the point that the Congress, if it chooses, can limit the President's control over agencies exercising quasi-legislative or quasi-judicial functions by limiting his power of removal of commission or board members.⁴

Congress itself has not been consistent or clear in regard to the relationship of the independent regulatory commissions and the President on all matters. In some cases the Congress has not acted at all and the President has claimed authority. A good example of this is the clearance of agency reports and testimony on legislation by the Bureau of the Budget. The independent commissions are asked to clear their legislative reports with the Budget Bureau. In general they comply although at one time the Interstate Commerce Commission successfully defied the President.⁵

⁴In only 1 case, that of the National Labor Relations Board, has the Congress imposed the requirement for notice and hearing in connection with a removal by the President. In other cases where limitations have been imposed, commission members are removable for cause, neglect of duty, or inefficiency. The question remains unanswered as to what would constitute a hearing or whether in any case disobeying a Presidential injunction would amount to neglect of duty, cause, or inefficiency.

Without a specific restriction all officers appointed by the President can be removed by him by implication from his power to appoint as well as from the grant of executive power in article II (*Ex parte Hennen*, 13 Peters 230, (1839)); and no restriction may be imposed in the case of purely executive functions (*Myers v. U.S.*, 272 U.S. 52). Moreover, the fact that Congress authorizes removal for certain causes does not in itself restrict the power of the President to remove for other causes in the case of executive functions (*Morgan v. Tennessee Valley Authority*, 115 F. 2d 990; cert. denied by the Supreme Court on March 17, 1941, 61 Sup. Ct. 806).

For other cases dealing in part with the general problem of the constitutional status of quasi-legislative and quasi-judicial functions see *Precision Castings Co. v. Boland*, 13 F. Supp. 877, 884 (1936); *Isbrandtsen-Moller Co. v.*, 14 F. Supp. 407, 412 (1936); *C. & S. Airlines v. Waterman Corp.*, 333 U.S. 103, 108-109 (1948). Also see the 1950 reorganization plans which transferred certain functions to the chairmen of certain regulatory commissions and which when coupled with the President's authority to designate the chairman of some commissions, broadened the President's authority over some of these agencies.

⁵See Executive Order 8248, September 8, 1939 and Budget Circulars A-9 and A-19. See also the *Presidency and Legislation: Growth of Central Clearance* by Richard Neustadt in the *American Political Science Review*, vol. 48, September 1954.

There are many statutes of governmentwide application where the Congress has used varying language and definitions to indicate whether or not the independent regulatory commissions are subject to Presidential control or direction. If the Congress is to make clear its intentions it needs to pay particular attention in writing laws to define the agencies to be covered by the law under consideration.

As a result of nonuniform draftsmanship it is sometimes not evident whether Congress intended to place the independent regulatory agencies under Presidential supervision in regard to certain controls. The terminology used by the Congress to define "Federal agency" and its counterpart or companion words should be improved. The legal situation, following the doctrine of the Humphrey case and others, is that Congress may keep the quasi-legislative and quasi-judicial functions independent or it may subject them to Presidential control. Where it does not act the President may claim his authority and the independent regulatory agencies may comply or not depending on whether they consider compliance a threat to their independence of action in the quasi-legislative or quasi-judicial field.⁶

As regards availability of Government information the nature of the independent regulatory commission has not figured in court opinions except that, as indicated below, the courts have drawn no distinction between independent regulatory commissions and executive agencies, holding that both operate on the basis of statutory authority. Therefore, in the field of information the relationship of the independent regulatory commission to the President is an untested one. Undoubtedly this is due to the fact that none of the commissions has yet found occasion to assert its independence of the President in regard to control over information policies. To date the tests of action by independent regulatory agencies have involved their asserted right to withhold information and thus have coincided with the position of executive agencies.⁷

⁶ Some instances of where Congress has given the President a measure of control may be useful. These controls are in addition to the power of appointing members of the commissions and also designating chairmen in some cases. Of greatest importance among the President's controls over the independent regulatory agencies is the President's control of the budget. Through this device the President can control the general course of agency activity without directing the disposition of any particular case. In the case of the Budget and Accounting Act the term "Department or establishment" is defined specifically to include "any independent regulatory commission or board" (31 U.S.C. 2).

When it comes to control over apportionments of appropriations the definition of agency does not specifically include the term "Independent regulatory commission." Consequently the reader of the statute is left to guess what was in the mind of the Congress. This is important because apportionments in the legislative branch, the judiciary, and the District of Columbia are under agency control as distinguished from Budget Bureau control which applies in the case of agencies in the executive branch (31 U.S.C. 665 as amended by sec. 1211 of Public Law 759, 81st Cong., 64 Stat. 765).

The Federal Reports Act governs the collection of information from business enterprises. This is a vital step in the quasi-legislative process. Under the act, controls are vested in the Bureau of the Budget. The act defines the term "Federal agency" as applying to the "executive branch" but the General Accounting Office and certain other agencies are specifically excluded (5 U.S.C. 139e). It requires a reading of the entire statute as well as of the legislative history to ascertain the intent of Congress.

For instance, an amendment was adopted to exempt the Federal Board from the Reserve provisions of the act although not by name (Congressional Record vol. 88, pt. 7, pp. 9161-9163). Similarly the House insisted on an amendment to exclude the General Accounting Office. (See Congressional Record, vol. 88, pt. 7, p. 9435 for conference report.)

Another interesting example is the authority of the President to cover positions into the classified civil service. This authority does include the independent regulatory commissions because it extends to "an executive department, independent establishment, or other agency of the Government" (5 U.S.C. 631a).

For other general Presidential managerial controls see 5 U.S.C. 662 as clarified by 5 U.S.C. 902 (Classification Act); 5 U.S.C. 851 (Veterans' Preference Act); 5 U.S.C. 1010 (Civil Service Commission authority over the hearing examiners under the Administrative Procedure Act); 5 U.S.C. 30K (annual and sick leave); 5 U.S.C. 73a and 5 U.S.C. 73b-4 (travel expenses.) 5 U.S.C. 116a (cash awards).

⁷ See, for example, the citation of executive precedents by the Securities and Exchange Commission in its brief *In the Matter of Appeal of Securities and Exchange Commission and William Timbers*, 6th circuit, No. 12503, 1955, pp. 88 et seq.

Judicial interpretation and precedent seem to indicate that neither the executive agencies nor the independent regulatory commissions have any inherent right to withhold information from the Congress. In this regard they are both in the same legal status. This will be discussed more fully in the following section.

III. THE RIGHT OF THE CONGRESS TO INFORMATION FROM THE EXECUTIVE AND INDEPENDENT REGULATORY AGENCIES

It should be stated at the outset that judicial precedents do not recognize any inherent right in any officer of the United States to withhold testimony of documents either from the judiciary or from the Congress of the United States. In other words, the mere claim of privilege by any Government agency is not enough in itself to establish any legal right of privilege. At the same time Congress has never exercised its ultimate sanctions to compel such testimony or production of documents. Nevertheless there is little or no doubt that Congress (a) may by legislation regulate the release of Government information and (b) may compel such release on its own by exercising its power of process for contempt of Congress directly and/or by punishment under the criminal statute for contempt of Congress.

The court decisions and precedents, which are almost exclusively cited as blanket authority for withholding information, should be carefully analyzed.

Court opinions—The position of the public and the courts

The first and most important fact is that court opinions upholding the right of Federal agencies to withhold information are (a) limited to withholding from non-Federal officials or from private citizens and (b) based on specific statutory authority authorizing such withholding. In none of the leading cases usually cited as precedent for executive authority was the Congress ever involved except as the source of legislative authority for the Federal agencies to withhold information from the public and the courts.

The case which underlies most of the court opinions regarding withholding of information by Federal agencies is *Boske v. Comingore* (177 U.S. 459, 1900). In that case the Commonwealth of Kentucky was proceeding in a tax matter against a whisky producer. The Federal Government was not a party to the suit. The local collector of internal revenue refused to produce reports filed with him in his official capacity by the defendant in the suit although the State wished to see those records. The local Federal official relied on regulations promulgated by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury under Revised Statutes, section 161.⁸

The Supreme Court held that the statute in question was a constitutional exercise of congressional power and that the regulation adopted by the Secretary of the Treasury pursuant to such statute was valid. The Court further held that the action of the subordinate

⁸ Revised Statutes, sec. 161 is the authority which figures most prominently in cases of withholding of information by executive agencies. It has been construed most liberally by the courts. The text of the law is now contained in 5 U.S.C. 22 and reads:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution performance of its business, and the custody, use and preservation of the records, papers, and property appertaining to it."

employee in refusing to produce the document in question was a valid action reasonably premised on the statute and one which could not subject him to any penalty.

The Court stated in part:

* * * In determining whether the regulations promulgated by him (The Secretary of the Treasury) are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress * * *

In *Ex parte Sackett*, 74 F. 2d 922 (1935) the Attorney General's power to make rules concerning documents in his Department was upheld. Again Revised Statutes, section 161 (5 U. S. C. 22) was involved. The court upheld the right of a special agent of the Department of Justice to refuse to produce the documents relying on the departmental regulations and on the specific instructions of the Attorney General. In this case, too, the suit was a private one—for damages under the antitrust laws—and the Federal Government was not a party.⁹

In these cases the basic ruling of the courts has been that a subordinate executive official may withhold information in a court proceeding where his action is taken pursuant to specific departmental regulation based upon valid action by a department head under authority granted by a Federal statute.

As far as the executive agencies are concerned the latest opinion which is most frequently cited as ruling law in regard to the withholding of information is *Touhy v. Ragen*, 340 U. S. 462 (1950). In this case the agent in charge of the Federal Bureau of Investigation at Chicago was served with a subpoena duces tecum requiring him to produce certain records in a habeas corpus proceeding in the United States District Court for the Northern District of Illinois. Relying upon a regulation of the Attorney General pursuant to 5 U. S. C. 22 the agent declined to produce the records after having been placed on the witness stand. Thereupon the judge found him guilty of contempt of court and sentenced him to be committed to the custody of the Attorney General or his authorized representative until he obeyed the order of the court or was discharged by due process of law.

On appeal the court of appeals reversed the district court. The Supreme Court found it unnecessary to consider—

* * * the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the Government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court. It is true that his subordinate, Mr. McSwain, acted in accordance with the Attorney General's instructions and a Department order. But we limit our examination to what this record shows, to wit, a refusal by a subordinate of the

⁹ A related case is *In re Lambertson*, 124 Fed. 446 (W. D. Ark. 1903). Here again the validity of departmental regulation under statutory authority was enough to uphold the action of a subordinate official in refusing to disclose information in a court proceeding. In this case there was involved information obviously traceable to the records which were subject to the departmental regulation.

Department of Justice to submit papers to the court in response to its subpoena duces tecum on the ground that the subordinate is prohibited from making such submission by his superior through order No. 3229. The validity of the superior's action is in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release Department papers. Nor are we here concerned with the effect of a refusal to produce in a prosecution by the United States or with the right of a custodian of Government papers to refuse to produce them on the ground that they are state secrets or that they would disclose the names of informants.

* * * Department of Justice Order No. 3229, note 1, *supra*, was promulgated under the authority of 5 U. S. C. sec. 22. That statute appears in its present form in Revised Statutes 161, and consolidates several older statutes relating to individual departments. Sec. e. g., 16 Stat. 163. When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious. Hence, it was appropriate for the Attorney General, pursuant to the authority given him by 5 U. S. C. sec. 22, to prescribe regulations not inconsistent with law for "the custody, use and preservation of the records, papers, and property appertaining to" the Department of Justice, to promulgate Order 3229.

Petitioner challenges the validity of the issue of the order under a legal doctrine which makes the head of a department rather than a court the head of a department rather than a court the determinator of the admissibility of evidence. In support of his argument that the Executive should not invade the Judicial sphere, petitioner cites Wigmore, *Evidence* (3d ed.), sec. 2379, and *Marbury v. Madison*, 1 Cranch 137. But under this record we are concerned only with the validity of Order No. 3229. *The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling. We think Order No 3229 is consistent with law. This case is ruled by Boske v. Comingore, 177 U. S. 459. [Italics supplied.]*

So important did Justice Frankfurter consider the fact that the Court reserved judgment on what rights the Attorney General himself might have to claim privilege before the courts that he wrote a concurring opinion which concluded as follows:

* * * I wholly agree with what is now decided insofar as it finds that whether, when and how the Attorney General himself can be granted an immunity from the duty to disclose information contained in documents within his possession that are relevant to a judicial proceeding are matters not here for adjudication. Therefore, not one of these questions is impliedly affected by the very narrow ruling on which the present decision rests. Specifically, the decision and opinion in this case cannot afford a basis for a future suggestion that the Attorney General can forbid every subordinate who is capable of being served by process from producing relevant documents and later contest a requirement upon him to produce on the ground that procedurally he cannot be reached. In joining the Court's opinion I assume the contrary—that the Attorney General can be reached by legal process.

Though he may be so reached, what disclosures he may be compelled to make is another matter. It will of course be open to him to raise those issues of privilege from testimonial compulsion which the Court rightly holds are not before us now. But unless the Attorney General's amenability to process is impliedly recognized we should candidly face the issue of the immunity pertaining to the information which is here sought. To hold now that the Attorney General is empowered to forbid his subordinates, though within a court's jurisdiction, to produce documents and to hold later that the Attorney General himself cannot in any event be procedurally reached would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle.

Touhy v. Ragen, therefore, again merely reiterated in more recent years the *Boske v. Comingore* opinion but with the important reservation by the Court of its right to decide what privilege the Attorney

General himself might claim as to withholding information under 5 U. S. C. 22.

In *U.S. v. Reynolds* (345 U. S. 1 (1952)) the Supreme Court has clarified somewhat its reservation of authority to determine the privileges claimed by the head of a department under 5 United States Code 22. In the Reynolds case the claim of privilege to withhold secret information was formally filed by the Secretary of the Air Force. He did this during the proceedings before the district court. The claim of privilege by the Secretary of the Air Force was based generally on Revised Statutes, section 161 (5 U. S. C. 22). As the brief for the United States pointed out, pages 20 and 21, the Boske and Touhy cases:

* * * both held that the regulation (under R. S. Sec. 161) provides a valid defense for inferior officer of Department governed by it against punishment for defiance of a court order directing disclosure. The question now to be considered is the question left open by *Touhy v. Ragen* (340 U. S. at 467, 470)—whether the department head who issues the regulation may personally decline to comply with an order directing disclosure.

In answering this question the Supreme Court refused to pass on what it termed "broad propositions pressed upon us for decision." The Court stated:

On behalf of the Government it has been urged that the Executive Department heads have power to withhold any documents in their custody from judicial view if the deem it to be in the public interest.

The Supreme Court footnoted this claim as follows:

While claim of executive power to suppress documents is based more immediately upon R. S. Sec. 161, the roots go much deeper. It is said that R. S. Sec. 161 is only a legislative recognition of an inherent executive power which is protected in the constitutional system of separation of power.

The Court refused to consider this proposition holding that it had—

* * * constitutional overtures which we find it unnecessary to pass upon, there being a narrower ground for a decision.

The Court then proceeded to decide the question on the basis of the statutory authority under title 5, United States Code, section 22. But within this statutory authority the Court made it quite clear that the mere assertion of the privilege will not be accepted by the judiciary as conclusive.

The Court stated:

* * * Nevertheless, the principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. The latter requirement is the only one which presents real difficulty. As to it, we find it helpful to draw upon judicial experience in dealing with an analogous privilege, the privilege against self-incrimination.

The privilege against self-incrimination presented the courts with a similar sort of problem. Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses. Indeed, in

the earlier stages of judicial experience with the problem, both extremes were advocated, some saying that the bare assertion by the witness must be taken as conclusive, and others saying that the witness should be required to reveal the matter behind his claim of privilege to the judge for verification. Neither extreme prevailed, and a sound formula of compromise was developed. This formula received authoritative expression in this country as early as the *Burr* trial. There are differences in phraseology, but in substance it is agreed that the court must be satisfied from all the evidence and circumstances, and "from the implications of the questions, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman v. United States*, 341 U.S. 479, 486-487 (1951). If the court is so satisfied, the claim of the privilege will be accepted without requiring further disclosure.

Regardless of how it is articulated, some like formula of compromise must be applied here. *Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.* * * * [Italics supplied.]

The Reynolds case stands for the proposition that even under statutory authority expressly granted by the Congress, as in title 5, United States Code, section 22, the head of the department himself cannot invoke privilege to withhold documents in a conclusive manner. The courts still have the right and the duty to rule on the invoking of the privilege by the department head. And it is significant that the court specifically refused to adopt, although requested to do so, the theory of the existence of an "inherent executive power which is protected in the constitutional system of separation of power."

In the few cases in which independent regulatory agencies have come before the courts in similar circumstances, the courts have followed the same reasoning as has been applied to Executive Departments. In the case of *Universal Airline Inc. v. Eastern Airlines Inc.* (188 Fed. 2d, 993 (1951)) the court of appeals specifically upheld the right of the courts to compel testimony from a Civil Aeronautics Board investigator despite his objections and despite the Board's regulation precluding expert testimony by such investigator in civil actions pursuant to the Board's interpretation of the Civil Aeronautics Act. The court held that the expert's testimony must be made available by deposition or in person where he is the sole source of evidence reasonably available to the parties. The court did uphold the Civil Aeronautics Board's construction of section 701 (e) of the Civil Aeronautics Act so as to sustain the Board's contention that the court could not compel an agent of the Board to produce its documents or to testify as to their contents. But the court upheld the Board's position because it found that under the circumstances such evidence would be heresay and the particular section of the statute:

* * * reveals the intention to preserve the functions of court and jury uninfluenced by the findings of the Board or investigators.

The Universal Airline case, therefore, shows that as regards independent regulatory agencies the courts hold as in the case of execu-

tive agencies that there is no inherent right to withhold information or testimony. In fact, as the case shows, the courts must be able to compel testimony in order to carry out the judicial function and such testimony will be compelled over the agency's objection where the testimony is the only reasonable available testimony. Similarly, as in the case of executive agencies, the Universal Airlines case upholds the right of an independent regulatory agency to withhold documents where the action is based on a specific statute and is not incompatible with the administration of the judicial function.

The most recent important case regarding the right to withhold information involves another independent regulatory agency, the Securities and Exchange Commission. This case was decided on October 19, 1955, and is titled: "Appeal of Securities and Exchange Commission and William H. Timbers No. 12503, Sixth Circuit," (226 Fed. 2d 501). The Timbers case applies the doctrine of *Touhy v. Ragen* to a subordinate employee of an independent regulatory agency. It upholds the right of an employee to withhold information pursuant to a valid regulation of the agency based on statute and pursuant to specific instructions based on statutory authority. In this case as in *Touhy v. Ragen*, a subordinate Federal official was held in contempt for refusing to produce in district court Federal documents sought in private litigation. The brief for the SEC and Timbers highlights the only significant difference between the *Touhy* and Timbers cases (pp. 68-69) in regard to the requirement for a tender of documents to the court.

* * * We turn now to the matter of the tender made by appellant Timbers. Unlike the department order and instructions involved in the *Touhy* case, Timbers was not required nor authorized by the Commission's rules and instructions to submit the documents in question to the Court "for determination as to (their) materiality to the case and whether in the best public interests the information should be disclosed" (340 U.S., at 464, n. 1). He was bound by Commission rules and instructions which forbade him to release the documents in question under any conditions whereby they might be made part of the public record. The most he was authorized to do, without contravening the Commission's rules, specific instructions, and formal Claim of Privilege, was to tender a questioned document to the Court so that the Court could ascertain whether, in fact, the particular document was covered by the Commission's claim of privilege and whether Timbers was actually following the Commission's rules and instructions. This he did, and this the District Judge flatly rejected. Judge Lederle, seemingly unconcerned with Timbers' lack of authority from the Commission in the matter, would not agree to any submission of documents except under circumstances which would permit him to place in the public record anything he considered to be nonprivileged; and, as previously indicated, he repeatedly stated that nothing in the Commission's files, in his view, would possibly be privileged. In brief, Timbers exhausted his authority in the matter. What occurred here was similar to that which took place in the *Touhy* case where, as here, the district judge demanded production of the documents for all purposes, and where, as a result, the documents were not produced at all (310 U.S., 465-468). In fact, no tender at all was made by the witness in the *Touhy* case. (*Italics supplied.*)

The court upheld the refusal of Timbers to make documents available without any limitation pursuant to the instructions of the Commission and pursuant to its regulations founded upon statutory authority in the Securities and Exchange Acts of 1933 and 1934 which authorize the Commission to adopt such rules and regulations as may be necessary to carry out its statutory functions. The court stated:

We find no logic in the argument of the attorneys for appellees that there is any material difference in principle here in view of the circumstances that in the *Touhy* and *Boske* cases the regulations involved were promulgated by heads of departments of Cabinet rank, while in the instant case the regulation was promulgated by an important administrative agency created by act of Congress and invested by the act with rulemaking powers.

Thus we see that executive agencies and independent regulatory commissions have had to base their claim of privilege to withhold information on statutory authority. We also find that in the case of both types of agencies the courts have recognized no inherent right to withhold information and, in fact, have reserved their right to rule on what may be withheld by the head of a department on his own personal claim of privilege even under statutory authority. The courts have also required testimony by a subordinate employee of an independent regulatory agency over the objections of his superiors.

The cases definitely indicate that the source of power to withhold information in a Federal agency is the law enacted by the Congress. The cases also indicate that even with specific statutory authority the courts will refuse claims of privilege and will reject them when they find them incompatible with the judicial function of determination of cases and controversies. Almost all of the cases involve subordinate employees and they hold that the action of a subordinate in refusing to give testimony or produce documents will be upheld if based on reasonable and valid regulations pursuant to statute issued by his superiors.¹⁰

Opinions of the Attorneys General (not including the May 1954 memorandum from Attorney General Brownell to President Eisenhower)

Several opinions of the Attorneys General are cited as precedent or authority for withholding information from congressional committees. A study of these opinions shows quite clearly that none of them cite any judicial authority for withholding information from congressional committees. In fact the older opinions which are usually cited are, like most of the court cases, concerned with the withholding of information in lawsuits not involving the Federal Government.

(1) *15 Op. A. G. 378 (1877)*.—The Attorney General in this case rendered an opinion to the Secretary of the Treasury. A subpoena duces tecum had been served on a United States attorney by a State court requiring him to appear as a witness in a private lawsuit and to bring with him all letters and telegrams received from the Commissioner of Internal Revenue relative to certain cases then pending in

¹⁰ See *U. S. v. Owlett*, 15 Fed. Supp. 736 (1936), in which an injunction was granted to restrain a committee of the State Senate in Pennsylvania from conducting an investigation into the Works Progress Administration. In this case the court stated: "The investigation by the respondents is an interference with the proper governmental function of the United States of America. The complete immunity of a Federal agency from State interference is well established. *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 6 S. Ct. 670, 29 L. Ed. 815; see, also, *Dobbins v. Erie County*, 16 Pet. 435, 10 L. Ed. 1022; *Buchanan v. Alexander*, 4 How. 20, 11 L. Ed. 597; *Flaherty v. Hanson*, 215 U. S. 515, 30 S. Ct. 179, 54 L. Ed. 307. This principle of immunity from State control or interference applies to official papers and records of the United States of America, *Boske v. Conningore*, 177 U. S. 459, 20 S. Ct. 701, 44 L. Ed. 846; *Ex parte Sackett* (C. C. A.) 74 F. (2d) 922; 25 Op. Atty. Gen. 326; and prevents a State from obstructing or interfering with employees of the United States of America in the discharge of their official duties, whether or not there is any expressed statutory provision for immunity."

See also the discussion of the issuance of a subpoena duces tecum to President Thomas Jefferson by Chief Justice Marshall in the Aaron Burr trial in the circuit court at Richmond, Va., in 1807 in: Herman Wolkison, *Demands of Congressional Committees for Executive Papers*, pt. II, *Federal Bar Journal*, vol. 10, pp. 277 et seq.

the United States court. The Attorney General advised that the United States attorney should appear in the State court in obedience to the subpoena and object to the production of the papers called for on the ground that their production would be prejudicial to the public interest if such is the case.

The Attorney General concluded that upon such objection being made the court would be governed by what the Attorney General considered the rule of law indicating that the production of such papers would not be compellable.

It is important to note that the Attorney General limits his opinion to the production of Federal documents in a private lawsuit. He states:

* * * Their exemption from being made instruments of evidence, in a suit between private parties, rests upon the principle that where the production of an official paper would be injurious to those interests, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice * * *.

It is also important to note the following statement by the Attorney General:

* * * I am not able to cite any adjudged cases from our American reports in which the rule exempting official papers from being used in evidence has been applied, but I find it laid down in American treatises of authority on the law of evidence as one which is well established and which governs the courts in this country; and the English decisions to which I have referred as illustrative of the rule and its application are cited in those treatises with apparent approval * * *.

(2) *20 Op. A. G. 577 (1893)*.—In this instance the Attorney General rendered an opinion to the President regarding the production of Civil Service Commission records in a private lawsuit. The Attorney General again premised his opinion on the balancing of the general public interest against that of private suitors. On that basis the Attorney General concluded:

3. The application and examination papers or other records of the civil-service examiners are therefore the official records or papers of the President or of the head of a Department.

4. Being records and papers of the character described, their production cannot be compelled by the courts whenever the general public interest must be deemed paramount to the interests of private suitors.

5. Whether such general public interest forbids the production of an official records or paper in the courts and for the purposes of the administration of justice, is a question not for the judge presiding at the trial in aid of which the record or paper is sought, but for the President or head of Department having the legal custody of such record or paper.

And such question may be determined either as and when arising in each particular case and upon its own peculiar facts and merits, or in advance, by general rules applicable to all records and papers, or by special rules applicable to special classes of records or papers.

(3) *25 Op. A. G. 326 (1905)*.—In this case the Attorney General advised the Secretary of Commerce and Labor with regard to a private law suit pending in the courts of New York concerning the status of the Secretary in response to the following questions:

1. Is the Secretary of Commerce and Labor legally bound to obey a subpoena of a court to appear and testify?

2. To what extent and upon what grounds may the Secretary decline to furnish official records of the Department, or copies thereof, or to give testimony in a cause pending in court?

3. May the Secretary legally prohibit the chief of a bureau of the Department from producing in court official records, or certified copies thereof, in obedience to a subpoena *duces tecum*, and from making or certifying copies of such official records?

Relying in great part on the opinion of the Supreme Court in *Boske v. Comingore* the Attorney General also discussed Revised Statutes, section 161, giving the heads of departments authority over the papers and records of their departments, and concluded that under this statute the head of the department could instruct his bureau chiefs in regard to the use of such records.

The Attorney General in this opinion quotes at some length from the case of *Boske v. Comingore* and also from the Aaron Burr case in which Chief Justice Marshall sustained an application for a subpoena *duces tecum* directed against the President. As far as the specific point of production of documents in the court is concerned, the Attorney General concluded that the express authority of a law of the United States would be required in order to compel the production of such documents. Specifically the questions raised were answered by the Attorney General as follows:

In view of the foregoing, I have the honor to advise you, regarding your first question, that in the absence of specific authority on the subject, I am inclined to think that you are not legally bound to appear and testify in obedience to a subpoena of a court. This question, however, does not actually arise upon the facts which you submit, and is therefore at present hypothetical. Yet it is to be remembered that Attorney General Lincoln saw fit to respond to a subpoena to testify as a witness by appearance in court for that purpose. I would suggest that in this instance, inasmuch as it is purposed to take the testimony by commission, and you are thus not required to appear in court, but before a referee or commissioner, an arrangement might readily be made which would better comport with the dignity of your office, as the head of an Executive Department of the Government, whereby such testimony as you should deem proper and advisable to give could be taken at the Department of Commerce and Labor.

As to your second question, I am of opinion that under the authorities cited above you may properly decline to furnish official records of the Department, or copies thereof, or to give testimony in a cause pending in court, whenever in your judgment the production of such papers or the giving of such testimony might prove prejudicial for any reason to the Government or to the public interest. The records of your Department are executive documents acquired by the Government for the purpose of administering its own affairs; they are to a certain extent *quasi* confidential in their nature, and must therefore be classed as privileged communications whose production can not be compelled by a court without the express authority of a law of the United States.

The Attorney General's opinion in this case shows that the authority to withhold information is based on specific statutory authority and the production of such documents may be compelled by a court under authority of a law of the United States. As for the conclusion of the Attorney General that the courts would be without power to enforce the process of subpoena, there is no evidence to indicate that such is the case.

(4) *40 Op. A. G. 45 (1941)*.—This opinion which is cited as authority for withholding information from the Congress does actually involve a request from a committee of Congress—the House Committee on Naval Affairs—for certain Federal Bureau of Investigation reports. The Attorney General addressed this opinion to the chairman of the House Committee on Naval Affairs and advised him that he did not consider it in the public interest that investigative reports be made

available to the Congress or the public. The Attorney General stated:

It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest.

Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

In taking this position the Attorney General stated that he was following conclusions reached by a long line of distinguished predecessors in the office of Attorney General. He proceeded to cite actions by previous Attorneys General.

Then the Attorney General stated that his predecessors have followed eminent examples. In regard to this statement he cited refusals of Presidents to comply with requests from the Congress for particular documents. Then the Attorney General stated that the courts have upheld the discretion to withhold in the executive branch. It is significant, however, that the Federal cases cited in the Attorney General's opinion do not stand for the proposition. He stated:

The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine.

For example, two of the cases cited in support of this proposition are *Boske v. Comingore* and *In re Lambertson*. In both of these cases which are discussed above the issue revolved around the right of a subordinate Federal official to refuse to produce documents or information pursuant to a regulation by his department head which the courts hold reasonable and valid under a specific statute of Congress (Rev. Stat. sec. 161, 5 U.S.C. 22).

These opinions of the Attorney General do not substantiate the broad claims of inherent executive privilege for which they are claimed to stand. It is further interesting to note that the earliest opinions do not cite any judicial precedent. One of them specifically contains the statement that the Attorney General is unable to find any American judicial precedent on the subject. The 1905 opinion of the Attorney General recognizes the importance of the statutory authority granted by the Congress in Revised Statutes, section 161, and concludes that in the absence of express statutory authority to the contrary the production of documents cannot be compelled by a court in a private lawsuit. The 1941 Attorney General's opinion brings in an alleged judicial precedent upholding a so-called discretion in the executive branch. It is very important to note, however, that no Attorney General prior to 1941 found any precedent in *Marbury v. Madison* for the so-called discretion to withhold information. In fact the 1905 opinion of the Attorney General cites the case of *Marbury v. Madison* as a precedent "for the appearance in court as a witness of the head of an executive department."

Memorandum to the President from Attorney General Brownell, May 1954

Some of the findings of the memorandum of Attorney General Brownell of May 1954 are accurate. Others are not. The major findings and/or conclusions are as follows:

American history abounds in countless illustrations of the refusal, on occasion, by the President and heads of departments to furnish papers to Congress, or its committees, for reasons of public policy.¹¹

Nor are the instances lacking where the aid of a court was sought in vain to obtain information or papers from a President and the heads of departments. Courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest; *they will not interfere with the exercise of that discretion, and that Congress has not the power, as one of the three great branches of the Government to subject the executive branch to its will any more than the executive branch may impose its unrestrained will upon the Congress.* [Italics supplied.]

The first sentence of the paragraph immediately above is correct, but as the cases discussed above clearly show the statement applies to production of evidence in a court proceeding and even then the power to withhold was upheld on the basis of specific statutory authority vested in the agency head or agency heads. An examination of the cases indicates very clearly that the courts have carefully limited their holdings to the validity of the statutory authority and the administrative action which flows from it. Never have the courts upheld or recognized the existence of any so-called inherent authority or "uncontrolled discretion" in the executive to withhold information from the judiciary. Most important, none of the cases involve the Congress.

The underlined part of the statement is merely an assertion by the Attorney General. It is at direct variance with the pertinent court rulings. In the Reynolds case the court specifically reserved its right to judge the reasonableness of a department head's actions under the circumstances. This was also the holding of the court in the Universal Airline case. And the importance of this reservation was emphasized by Justice Frankfurter in his concurring opinion in *Touhy v. Ragen*. In the Reynolds case the court drew an analogy to the general problem of assertion of privilege against self-incrimination. The court concluded that a similar formula must be applied here and that the mere assertion of privilege is not enough.

The broad scope of the authority of Congress to investigate and compel testimony

While there is no legal right in the executive branch to withhold information except pursuant to the statutes enacted by the Congress, the investigatory power of the Congress is as broad as its legislative power. Judicial rulings on this subject are clear. And the courts have also held that Congress has authority to compel testimony and the production of documents through use of its contempt power

¹¹ On the other hand the executive branch as a general rule does present information to the Congress upon its request and Presidents have responded to calls to information from the Congress. For a discussion of these actions as precedents in part for the right of Congress to obtain information see Philip R. Collins, *The Power of Congressional Committees of Investigation to Obtain Information from the Executive Branch: The Argument for the Legislative Branch*, *Georgetown Law Journal*, vol. 39, p. 563 (1951). Particularly pertinent is Mr. Collins' discussion of cases in which the President furnished information at the request of Congress in the case of the *Ship New Jersey* in 1835, and in the case of certain foreign affairs matters in 1813. Heads of departments have responded to requests for information from the Congress, among the Cabinet members who have complied are the Secretary of State, Secretary of War, and the Attorney General.

directly or through citation for contempt under statute making contempt of Congress a crime against the United States (Rev. Stat., sec. 102, 2 U.S.C. 192).

In *McGrain v. Daugherty* (273 U.S. 135, 1927) the Supreme Court specifically considered the inherent power of Congress to compel testimony before a committee or at the bar of either House by service of process. Daugherty had been subpoenaed to appear before a Senate committee. He was personally served and he refused to appear. After his refusal the Senate adopted a resolution reciting these facts and resolving that the President of the Senate command the Sergeant at Arms or his Deputy to take Daugherty into custody; to bring him before the bar of the Senate to answer such questions pertinent to the matter under inquiry as the Senate may order the President of the Senate to propound; and to keep Daugherty in custody to await the further order of the Senate. Daugherty was released on a writ of habeas corpus by the Federal district court in Cincinnati. The Supreme Court reversed the action of the Federal district court. The Court stated:

* * * We have given the case earnest and prolonged consideration because the principal questions involved are of unusual importance and delicacy. They are (a) whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution, and (b) whether it sufficiently appears that the process was being employed in this instance to obtain testimony for that purpose.

After a lengthy consideration of history and precedent the Court concluded:

* * * We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both Houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other Members whose service in the Convention which framed the Constitution gives special significance to their action—and both Houses have employed the power accordingly up to the present time. The acts of 1798 and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both Houses and to enable them to employ it “more effectually” than before. So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

* * * We are further of opinion that the provisions are not of doubtful meaning, but, as was held by this Court in the cases we have reviewed, are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end. While the power to exact information in aid of the legislative function was not involved in those cases, the rule of interpretation applied there is applicable here. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appro-

prate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that constitutional provisions which commit the legislative function to the two Houses are intended to include this attribute to the end that the function may be effectively exercised. * * *

Regarding the legislative purpose of the inquiry the Court stated:

* * * We come now to the question whether it sufficiently appears that the purpose for which the witness' testimony was sought was to obtain information in aid of legislative function. The court below answered the question in the negative and put its decision largely on this ground, as is shown by the following excerpts from its opinion * * *.

* * * * *

* * * We are of opinion that the court's ruling on this question was wrong, and that it sufficiently appears, when the proceedings are rightly interpreted; that the object of the investigation and of the effort to secure the witness' testimony was to obtain information for legislative purposes.

It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and that the Department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the subject would have been better; but in the view of the particular subject matter was not indispensable * * *.¹²

In an earlier case, *In re Chapman* (166 U.S. 661 (1897)) the Supreme Court considered the question of whether a criminal proceeding for contempt of Congress under Revised Statutes sections 102 and 104 could be maintained. Sections 102, 103, and 104 and section 859 of the Revised Statutes were derived from an act of January 24, 1857, entitled, "An act more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony." The petitioner challenged the constitutionality of the statutory provisions after having refused to answer questions propounded to him by a special Senate committee and after having been convicted under the aforesaid statutory provisions for contempt of Congress.

The Supreme Court held that the questions propounded to the witness were pertinent to the subject matter of the inquiry and that the matter was in the range of the constitutional powers of the Senate. As to the question of whether the Senate had exceeded its authority in the particular inquiry, the Court stated:

¹² The Court also considered the question of whether the case had become moot because of the expiration of the Congress in which the Senate committee had been appointed. The resolution ordering the investigation had limited the committee's authority to the particular Congress, but apparently was changed by a later resolution authorizing the committee to sit at such times or places as it might deem advisable. The Court held that the Senate was a continuing body and that the case had not become moot.

We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body. Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded.

The Court also considered two objections to the law. First, it was contended that the law was an unconstitutional delegation to the courts of the exclusive jurisdiction and power of the Houses of Congress to punish for contempt. A second contention, in the pose of a dilemma, was that if the law left in each House the power to punish contempt then the law would be invalid because of double jeopardy which would be contrary to the fifth amendment.

As to the first contention, the Court stated:

* * * because Congress, by the act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved, and the statute is not open to objection on that account.

The Court also rejected the plea of double jeopardy as follows:

Nevertheless, although the power to punish for contempt still remains in each House, we must decline to decide that this law is invalid because it provides that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States, who are interested that the authority of neither of their departments, nor of any branch thereof, shall be defied and set at naught. It is improbable that in any case cumulative penalties would be imposed, whether by way of punishment merely, or of eliciting the answers desired, but it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offense, since the same act may be an offense against one jurisdiction and also an offense against another; and indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together.

In the case of *Fields v. United States* (164 Fed. 2d 97 (1947)) there was considered the meaning of the word "willful" in connection with refusals to testify or give evidence under the 1857 statute now contained in title 2 United States Code, section 192. In this case Fields was convicted of failing to produce papers required by a select committee of the House of Representatives. The evidence of the existence of the papers in question was indicated by a memorandum presented to the committee by Fields himself. Nevertheless, in response to repeated requests from the committee and in answer to a subpoena duces tecum Fields insisted in stating that he had given the committee all that he had in the way of papers which did not include the documents in issue.

In appealing his conviction Fields contended that the word, "willful" had a meaning including an evil or bad purpose when used in a criminal statute. The court rejected this contention and stated that a statute must be construed bearing the objective in mind, thereby precluding an interpretation that would defeat the statute's very purpose. The court stated:

A legislative committee of inquiry vested with power to summon witnesses and compel the production of records and papers is an institution rivaling most legislative institutions in the antiquity of its origin. One of the earliest instances of the exercise of this power is found in Sir Francis Goodwin's case in 1604, wherein authority was delegated to a parliamentary committee to summon par-

ticular witnesses and to require the production of records. Prior to the adoption of our Constitution colonial assemblies frequently assumed authority to punish for contempt any person who refused to appear in answer to a summons or who failed to disclose information required for the effective administration of government. After the Constitution was adopted Congress assumed this power. In 1792 it appointed an investigating committee "to call for such persons, papers, and records, as may be necessary to assist their inquiries." From that date to 1929 Congress authorized over 300 investigations to assist the performance of its several functions. Since that time Congress has made abundant use of investigating committees, a natural consequence of the expanding scope of legislative concern with administration.

Such a brief reference to the historical background of congressional investigating committees is sufficient to support the premise that Congress was only implementing a conceded power when it enacted the statute providing punishment for contempt of such committees. The statute only serves to supplement the contempt power implied to the Houses of Congress, the enforcement of which, prior to the enactment of the statute, involved a procedure which was cumbersome and troublesome. Its objective was to facilitate the gathering of information deemed pertinent to the purpose of an investigating committee.

The apparent objective of the statute involved here would be largely defeated if, as appellant contends, a person could appear before a congressional investigating committee and by professing willingness to comply with its requests for information escape the penalty for subsequent default.

In *United States v. Bryan* (72 F. Supp. 58 (1947)) the defendants had moved for dismissal of the indictments under title 2 United States Code, section 192, for failure to produce documents subpoenaed by the House Committee on Un-American Activities and for conspiracy to violate title 2, United States Code, section 192. On one ground urged by the defendant, that is, that the persons summoned before a committee may be uncertain as to the committee's jurisdiction, the court stated that a person who thinks a resolution creating an investigating committee is invalid makes the challenge at his own risk. The court stated:

It is argued, however, that a person who is directed to appear or produce documents before the committee may be at sea in endeavoring to determine whether the committee is acting within its jurisdiction. It must be borne in mind, however, that the statute (U. S. C. A., title 2, sec. 192) which punishes failure to comply with a subpoena or to answer questions is definite and makes a willful default a misdemeanor. A person who declines to comply with a direction of the committee on the basis of a claim that the resolution creating it is invalid, or that the committee is exceeding its jurisdiction, acts at his peril. The provisions of an investigating resolution are not drawn primarily for the benefit of a witness, but are framed for the guidance of the committee. There are many situations in which a person assumes a risk in determining whether what he intends to do constitutes a crime. This is true, for example, in respect to violations of the antitrust laws, because what constitutes an illegal restraint of trade is frequently a debatable matter.

Moreover the court went on to point out that the exact scope of an investigation cannot be charted in advance. The court quoted the Supreme Court on this point in *McGrain v. Daugherty* as well as *In re Chapman*. The Court stated:

No doubt many an act of Congress may be found in which general terminology is intentionally or unintentionally employed. This is true of the present resolution. The committee is directed to investigate un-American and subversive activities. The exact scope of an investigation cannot always be charted and bounded in advance with the precision of a survey. In conducting a research inquiry, or an investigation, some discretion must be left to those to whom the task is entrusted, if the objective is to be attained. If we analyze the words "un-American" and "subversive," and there are some activities which everyone will agree are un-American and subversive, and there are others which everyone will

place in the opposite group. Between the two extremes, no doubt, there will be some gradations in respect to which persons may well differ. There may well be differences of opinion as to the exact application or meaning of these terms, or as to whether some particular activity falls in one class or another. This circumstance does not deprive the Congress of the power to investigate un-American and subversive activities, and for the purposes of carrying out its duties to vest in the investigating committee the discretion to make a preliminary determination as to what activities are comprised within these two terms.¹³

Thus the courts have held that Congress has the power to compel testimony both by process directly against the person to bring him before the bar of either House and/or by criminal punishment for contempt under Revised Statutes, section 102. In addition, the courts have held that the legislative power of inquiry is as broad as the legislative power granted to Congress under the Constitution. A legislative purpose will in fact be presumed and the scope of the legislative inquiry cannot be restricted by the same limitations imposed on a judicial inquiry. For in fact one of the purposes of a legislative inquiry is an exploration of the facts and alternatives involved in any situation.

In the leading article making the argument for an alleged right of the executive to withhold information from the Congress by Wolkinson there is some discussion of the precedent afforded by the case of George F. Seward in 1878-79.¹⁴ The discussion by Wolkinson centers largely about House Report 141 of the 45th Congress, 3d session. Wolkinson quotes segments of this report as precedents upholding the right of the Executive to refuse to furnish information to the Congress.

A fuller consideration of all of the facts in the Seward case, including the two other House reports in the 45th Congress, shows that there is ample precedent to the contrary in the Seward case, that is, that

¹³ There are several other leading opinions indicating the broad scope of the investigative powers of the committees of Congress. In *United States v. Dennis* (72 F. Supp. 417 (1947) the Court held that the power to investigate cannot be judged by whether any legislation has or will emanate from a particular committee. On this point the Court stated:

"That no proposed legislation is pending or may result therefrom, is of no concern. The fact, if such be the case, that no legislation has emanated from the committee in no wise affects its validity (*Townsend v. United States*, 68 App. 223, 226; 95 F. 2d 352; certiorari denied, 303 U.S. 664; 58 Sup. Ct. 830, 82 L. Ed. 1121). It might well be that as the result of such investigation or inquiry Congress would be so advised as to prevent enactment of detrimental legislation. On occasions Congress desires to look into the advisability of proposed amendments to the Constitution. To take this vital step certainly requires adequate investigation and inquiry.

"It is suggested that the possible field within which the Congress could legislate with reference to the subject under inquiry is vested in other committees. The defendant is not in a position to complain of this. Furthermore, the resolution in question specifically provides that the committee shall report to the Congress. It may well be that, on presentation, such report would be referred to another committee, or to several committees, for consideration and possible action."

In *United States v. Josephson* (165 F. 2d 82 (1947)) the Court restated the proposition that a legislative purpose will be presumed in a legislative investigation. The court refused to decide in advance whether a congressional investigation may have exposure as its principal goal stating:

"*** It is sufficient to say that the authorizing statute contains the declaration of Congress that the information sought is for a legislative purpose and that fact is thus established for us ***" (p. 89).

In *Townsend v. United States* (95 F. 2d, 352 (1938)) the Court stated the breadth of the power of legislative inquiry and distinguished it from judicial inquiry as follows:

"A legislative inquiry may be as broad, as searching and as exhaustive as is necessary to make effective the constitutional powers of Congress (*McGrain v. Daugherty*, 273 U.S. 135; 47 Sup. Ct. 319; 71 L. Ed. 580; 50 A.L.R. 1). A judicial inquiry relates to a case and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates all possible cases which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry, which generally is very broad. Many a witness in a judicial inquiry has, no doubt, been embarrassed and irritated by questions which to him seemed incompetent, irrelevant, immaterial, and impertinent. But that is not a matter for a witness finally to decide. Because a witness could not understand the purpose of cross-examination, he would not be justified in leaving a courtroom. The orderly processes of judicial determination do not permit the exercise of such discretion by a witness. The orderly processes of legislative inquiry require that the committee shall determine such questions for itself. Within the realm of legislative discretion, the exercise of good taste and good judgment in the examination of witnesses must be entrusted to those who have been vested with authority to conduct such investigations."

¹⁴ The article is cited in footnote 10, supra.

under congressional power Seward was amenable to punishment for contempt pursuant to the 1857 statute (Revised Statutes, sec. 102); that Seward could be and was brought before the bar of the House for his refusal to answer questions; and that his final exculpation through the report of the House Judiciary Committee came because it upheld his right to plead the fifth amendment because of the criminal nature of the acts being investigated combined with the fact that he had been recommended for impeachment by the House Committee on Expenditures in the State Department.

George F. Seward had been consul-general in Shanghai, and at the time of the investigation was United States Minister to China. The House Committee on Expenditures in the State Department proceeded to investigate the affairs of the consulate at Shanghai during Seward's incumbency of that office. In brief, it was alleged that while consul, Seward had used his office to extract illegal money payments and had also collected Government fees which he had loaned out at high interest rates, pocketing the interest for his own benefit. When brought before the House committee, Seward refused to answer any questions; refused to take any oath; and refused to produce any of his books pursuant to a subpoena duces tecum which was issued February 19, 1879. Through his counsel he said the books were no longer his but were books belonging to the United States and he also claimed the protection of the fifth amendment to the Constitution against self-incrimination.

The committee summarized Seward's refusal to be sworn or produce the books, and citing Revised Statutes 102, 103, 104, and 859, stated:

Unless this statute is in conflict with the Constitution, it covers the case and is conclusive of the questions. Mr. Seward is a *person* (italicized); has been served with a subpoena, and has refused to take the oath required by law; and this carries with it a refusal to answer any pertinent and proper question. * * * (House Rept. 117, 45th Congress, 3d sess., p. 11.)

The report of the House Committee on Expenditures in the State Department therefore clearly indicates that in 1879 this committee specifically considered a United States Minister, George F. Seward, as being subject to punishment for contempt of Congress under the 1857 statute now contained in 2 United States Code 192.

The committee then went on to discuss the pleading of the fifth amendment and rejected the idea that it was intended to cover an investigation before a congressional committee. In any event, the committee concluded that those conducting the inquiry should determine the question of claim of privilege. The committee recommended to the House that the Sergeant at Arms bring Mr. Seward before the bar of the House to show cause why he should not be punished for contempt.

In a subsequent report of March 3, 1879 (H. Rept. 134, 45th Cong., 3d sess.) the committee recommended to the House that Mr. Seward be impeached of high crimes and misdemeanors while in office.

When Mr. Seward came before the House, in answer to the questions of the Speaker he set up practically the same claim that he made before the committee. The matter was referred by the House to the Judiciary Committee as to whether the cause shown by Seward was a

sufficient answer. The report of the Judiciary Committee summarized his claim before the Committee on Expenditures.

* * * Seward appeared in obedience to the subpoena but declined to be sworn as a witness in a case where crime was alleged against him and where articles of impeachment might be found against him claiming, through his counsel, his constitutional privilege of not being obliged to produce evidence in a criminal case tending to criminate himself.

The Judiciary Committee concluded that in making an investigation of facts charged against an officer of the United States looking to impeachment, the House acts as the grand inquest of the Nation to present the officer for trial before the highest court, the Senate of the United States. Therefore, the committee said if Seward's books are private books kept for his personal use, or private books intermixed with his private transactions he cannot be compelled to produce them in view of the criminal nature of the proceedings against him. The committee said that this would be so even if he had possessed himself of public records which contain evidence:

* * * to accuse him of crime in such a contestation (which makes a criminal case) * * *.

The committee stated that in the circumstances a subpoena duces tecum is not a remedy of the Government against Seward, but if the Congress believes that these are public books a subpoena duces tecum should be issued to the highest executive officer having charge, custody and control of such public records. The Judiciary Committee concluded:

Therefore, your committee report to the House that, in their opinion, George F. Seward has shown sufficient cause why he should not be sworn as a witness in the investigation of charges looking to his impeachment by the Committee on Expenditures in the State Department, and why he should not produce the books, whether they are private books solely, or, for the reason above stated, are public books, in which criminatory matter may be contained; and therefore recommend the adoption of the following resolution:

"Resolved, That under the facts and circumstances reported from the Committee on Expenditures in the State Department, George F. Seward was not in contempt of the authority of this House in refusing to be sworn as a witness or produce before said committee the books mentioned in the subpoena duces tecum."

It can thus be seen that the Seward case does contain precedent to show that a United States officer may be punished for contempt under Revised Statutes 102. On the other hand it also stands for the proposition that where the nature of the charges are criminal and where they have been combined with action looking toward impeachment, the individual officer may plead the fifth amendment and the Congress may not compel testimony by means of a subpoena duces tecum.

In the case of *Marshall v. Gordon* (243 U.S. 521 (1917)) the Supreme Court considered the power of the Congress to deal directly with contempt in the case of a Federal official. Marshall, while United States Attorney for the southern district of New York, addressed a letter to the chairman of a subcommittee of a House Judiciary Committee and gave to the press a copy of that letter. The letter was such as to arouse the indignation of the Judiciary Committee and that of the House generally.

The Judiciary Committee reported the matter to the House and a select committee was appointed to consider the subject. The District

Attorney was called before the committee and reasserted the charges made in the letter. The select committee made a report to the House stating that the letter published by Marshall—

* * * is as a whole and in several of the separate sentences, defamatory and insulting and tends to bring the House into public contempt and ridicule * * *

The House adopted the report of the select committee and had Marshall arrested on a formal warrant for arrest by the Sergeant at Arms. The case came to the Supreme Court upon the refusal of the court below to grant Marshall a writ of habeas corpus. The Supreme Court reversed the action of the court below and directed the discharge of Marshall from custody.

In doing so, however, the Court dealt extensively with the right of Congress to proceed directly for contempt. The Court rejected the idea that the Congress could inflict punishment upon Marshall for the type of contempt he had committed as a matter of legislative power. The Court pointed out that in the United States the Congress does not exercise a combination of judicial and legislative powers such as are blended in the Parliament of England because of its peculiar history. The Court reviewed the problem of congressional authority to deal with contempt and concluded that it had a broad authority to do so in order to preserve its legislative power. The Court stated:

* * * The legislative history of the exertion of the implied power to deal with contempt by the Senate or House of Representatives when viewed comprehensively from the beginning points to the distinction upon which the power rests and sustains the limitations inhering in it which we have stated. The principal instances are mentioned in the margin and they all except 2 or 3 deal with either physical obstruction of the legislative body in the discharge of its duties, or physical assault upon its Members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of Members from attending so that their duties might be performed, or finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel. In the 2 or 3 instances not embraced in the classes we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt to be punished according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten, that is to say, the legislative right to exercise discretion was confounded with the want of judicial power to interfere with the legislative discretion when lawfully exerted. But these considerations are accidental and do not change the concrete result manifested by considering the subject from the beginning. Thus we have been able to discover no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify the penalty or punishment for the refusal remaining controlled by the general criminal law. So again we have been able to discover no instance, except the 2 or 3 above referred to, where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration. And this latter statement causes us to say, referring to *Kielley v. Carson*, supra, that where a particular act because of its interference with the right of self-preservation comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions and therefore without resort to judicial proceedings under

the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it. On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence, that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case as in every other, unless there be manifest an absolute disregard of distretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference * * *

The Court also stated that as expressly pointed out in *Anderson v. Dunn* (6 Wheat. 204), the power when applied to subjects which justify its exercise is limited to imprisonment and such imprisonment may not be extended beyond the session of the body in which the contempt occurred.¹⁵

IV. CONCLUSIONS OF LAW

1. Refusals by the President and heads of departments to furnish information to the Congress are not constitutional law. They represent a mere naked claim of privilege. The judiciary has never specifically ruled on the direct problem involved in a refusal by Federal agencies to furnish information to the Congress.

2. As far as access to information is concerned the courts have not distinguished basically between executive agencies and quasi-legislative or quasi-judicial agencies. Both appear to stand in the same status.

3. Judicial precedent shows that even the President has been held to be subject to the power of subpoena of the courts. While this is so, it may be that the only recourse against the President himself is impeachment if he fails to comply with a subpoena of either the courts or the Congress.

4. Any possible presidential immunity from the enforcement of legal process does not extend to the heads of departments and other Federal agencies. Judicial opinions have never recognized any inherent right in the heads of Federal agencies to withhold information from the courts. The courts have stated that even where the

¹⁵ In addition to the judicial precedent cited the Congress itself has given definite indications that it has the authority to deal directly with executive officials other than by proceedings for impeachment. See the discussion in the article by Phillip R. Collins cited above concerning the series of debates in the Senate in March 1886, with regard to the refusal of the Attorney General to furnish certain papers to the Senate Judiciary Committee. Of particular importance is the rejection by the Senate of an amendment to four resolutions condemning the action of the Attorney General. The amendment which was defeated would have disclaimed the right or power of the Senate to punish the Attorney General by imprisonment or other wise than by impeachment.

See also the history of House Joint Resolution 342 adopted by the House of Representatives on May 13, 1948, but not acted upon by the Senate. This resolution would have required the furnishing of information by the executive agencies to the Congress when requested by a majority of votes of the members of any committee of Congress. In this case one House of the Congress went so far as to adopt a resolution which provided a specific procedure for obtaining information from the executive branch.

House Joint Resolution 342 was intended to clarify the right of all committees of Congress to obtain information from Federal agencies. In this connection it is important to note the following provisions of law enacted in 1928 for the Committee on Expenditures in the Executive Departments, (now the Committee on Government Operations) and contained in title 5, United States Code, section 105a: "Every executive department and independent establishment of the Government shall, upon request of the Committee on Expenditures in the Executive Departments of the House of Representatives, or of any 7 members thereof, or upon request of the Committee on Expenditures in the Executive Departments of the Senate, or any 5 members thereof, furnish any information requested of it relating to any matter within the jurisdiction of said committee" (May 29, 1928, ch. 901, No. 2, 45 Stat. 996).

head of the department or agency bases his action on statutory authority the courts will judge the reasonableness of the action in the same light as any other claim of privilege. The courts have held that the mere claim of privilege is not enough.

5. There is no inherent right on the part of heads of departments or other Federal agencies to withhold information from the Congress any more than they have a right to withhold information from the judiciary. Judicial precedent shows that Congress may use the power of contempt directly against Federal officials. Congressional precedent shows that Federal officials are subject to the use of the subpoena power under Revised Statutes, section 102. In view of the fact that Congress has used its power of contempt directly against a Federal official and the right has been upheld by the Supreme Court, and the Court has also recognized the right of Congress to punish for contempt under a criminal statute such as Revised Statutes, section 102, there is little question that Congress may also have Federal officials prosecuted under Revised Statutes, section 102 for refusal to comply with a request for information.

If a Federal official is convicted for contempt under Revised Statutes, section 102, then the President's power of pardon would undoubtedly operate since conviction under Revised Statutes, section 102 is an offense against the United States which is pardonable.

If Congress exercises its power of contempt directly against a Federal official he may be imprisoned until he complies with the request from Congress but his imprisonment may not extend beyond the session of the Congress in which the contempt was committed. In event of the exercise of the legislative power of contempt the only recourse to the judiciary is in cases clearly outside the authority of Congress. Similarly there would be no power in the President to pardon since this is not an offense against the United States within the meaning of the constitutional power of pardon.

6. Judicial precedent recognizes the power of Congress to grant control over official Government information to the heads of Federal agencies.

The general "housekeeping" statute, Revised Statutes, section 161 (5 U. S. C. 22), has been made into an information statute in the absence of specific and comprehensive legislation on the subject by the Congress. The growth of law concerning the release of information which has been based on this statute and several other noninformation statutes indicates a need for direct congressional consideration of information legislation. If Congress intended Revised Statutes, section 161, to be a housekeeping statute it should clarify its intent. On the other hand if the intent was to have this statute cover the field of information then there is a need for Congress to make this clear and to make the term of the statute adequate to present-day needs.

If Congress can grant control over public records and documents by statute it follows that it can also regulate the release of such information and, in fact, require the release of such information by the heads of agencies upon terms and conditions prescribed by the Congress. This would be an exercise of the authority of the Congress:

To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof (art I, sec. 8).



EXECUTIVE PRIVILEGE

PART 4—SUPREME COURT DECISIONS

CASE NO. 14,692D

UNITED STATES *v.* BURR¹

[Coombs' Trial of Aaron Burr, 37]

Circuit Court, D. Virginia. June 13, 1807

CRIMINAL LAW—SUBPENA DUCES TECUM—TIME OF ISSUE—TO PRESIDENT—RIGHT TO—MATERIALITY OF EVIDENCE

[1. Any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses.]

[2. A subpoena may issue to the president of the United States to compel his attendance as a witness, and an accused person is entitled to it of course.]

[3. A subpoena duces tecum may issue to the president of the United States, directing him to bring any paper of which the party praying it has a right to avail himself as testimony.]

[4. In Virginia, a motion for a subpoena duces tecum is to the discretion of the court; and as a legal means of obtaining testimony it cannot be regularly opposed by the opposite party in his character as such.]

[5. A motion to the discretion of a court is a motion nor to its inclination, but to its judgment, which is to be guided by sound legal principles.]

[6. The court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material to his defense.]

[7. An accused person has the right, before indictment found, to compel, by way of precaution, the production of letters containing statements of his conduct written by the person who is declared to be the essential witness against him.]

[8. And in such case he is entitled to the production of the original letter, a copy not being sufficient.]

[9. Where it does not affirmatively appear that letters and executive orders in the hands of the president of the United States which may be material to the defense of an accused contain any matter which it would be imprudent to disclose, a subpoena duces tecum will issue. The fact that such letters and orders may contain matter not essential to the defense, and which ought not to be disclosed, will appear on the return.]

[At law. Motion for a subpoena duces tecum directed to the president of the United States.]

[Tuesday, June 9, 1807. The grand jury were adjourned to the following Thursday.]

Mr. Burr then addressed the court. There was a proposition which he wished to submit to them. In the president's communication to congress, he speaks of a letter and other papers which he had received from Mr. Wilkinson, under date

¹ [For references to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron Burr, see footnote to Case No. 14,602a.]

of 21st of October. Circumstances had now rendered it material that the whole of this letter should be produced in court; and further, it has already appeared to the court, in the course of different examinations, that the government have attempted to infer certain intentions on my part from certain transactions. It becomes necessary, therefore, that these transactions should be accurately stated. It was, therefore, material to show in what circumstances I was placed in the Mississippi territory; and of course, to obtain certain orders of the army and the navy which were issued respecting me. I have seen the order of the navy in print; and one of the officers of the navy had assured me that this transcript was correct. The instructions in this order were, to destroy my person and my property in descending the Mississippi. Now I wish, if possible, to authenticate this statement; and it was for this purpose, when I passed through Washington lately, that I addressed myself to Mr. Robert Smith. That gentleman seemed to admit the propriety of my application, but objected to my course. He informed me that if I would apply to him through one of my counsel, there could be no difficulty in granting the object of my application. I have since applied in this manner to Mr. Smith, but without success. Hence I feel it necessary to resort to the authority of this court to call upon them to issue a subpoena to the president of the United States, with a clause, requiring him to produce certain papers; or, in other words, to issue the subpoena duces tecum. The attorney for the United States will, however, save the time of this court, if he will consent to produce the letter of the 21st October, with the accompanying papers, and also authentic orders of the navy and war departments.

Mr. Hay declared that he knew not for what this information could be wanted; to what purpose such evidence could relate; and whether it was to be used on the motion for commitment or on the trial in chief.

Mr. Burr, Mr. Wickham, and Mr. Martin observed that perhaps it would be used on both, according as circumstances might require.

Mr. Hay declared that all delay was unnecessary; but he pledged himself, if possible, to obtain the papers which were wanted; and not only those but every paper which might be necessary to the elucidation of the case.

After considerable of conversation between counsel as to the objects of applying for the subpoena, and the probability of obtaining the papers without it, Mr. Wickham remarked that as to the order from the navy department, a copy might be sufficient, but as to Wilkinson's letter, "We wish to see itself here; and surely it may be trusted in the hands of the attorney for the United States."

Mr. Hay then said: It seems, then, that copies of papers from the government of the United States will not be received! After such an observation, sir, I retract everything that I have promised: let gentlemen, sir, take their own course.

Mr. Wickham explained, disavowing any insinuation against the fairness of the conduct of the government. But he wanted the highest possible degree of evidence, and to confront General Wilkinson with his own letter.

Mr. Hay was satisfied with the explanation, and renewed his promise to apply for the papers if the court deemed them material.

After some further conversation which did not result in any arrangement satisfactory to Mr. Burr's counsel!—

The CHIEF JUSTICE said: If the attorney for the United States is satisfied that the court has a right to issue the subpoena duces tecum, I will grant the motion.

Mr. Hay. I am not, sir.

CHIEF JUSTICE. I am not prepared to give an opinion on this point, and therefore I must call for argument.

After some further conversation, the court adjourned.

WEDNESDAY, JUNE 19, 1807.

The court met according to adjournment. The subject of the subpoena duces tecum was resumed.

The following affidavit, drawn up and sworn to by Mr. Burr, was read in support of the motion for the subpoena.

"Aaron Burr maketh oath, that he hath great reason to believe that a letter from General Wilkinson to the president of the United States, dated 21st October, 1806, as mentioned in the president's message of the 22d January, 1807, to both houses of congress, together with the documents accompanying the said letter, and copy of the answer of said Thomas Jefferson, or of any one by this authority, to the said letter, may be material in his defence, in the prosecution against him. And further, that he hath reason to believe the military and naval orders given by the president of the United States, through the departments of war and of

the navy, to the officers of the army and navy, at or near the New Orleans stations, touching or concerning the said Burr, or his property, will also be material in his defence.

"AARON BURR.

"Sworn to in open court, 10th June 1807."

Upon this motion a protracted debate arose, occupying two entire days, and extending into the third, in which the motion was supported by Messrs. Wickham, Botts, Randolph, Martin, and Burr, and opposed by Messrs. Hay, MacRae, and Wirt. Much ability and eloquence were displayed on both sides. But few points of law were contested in the argument, and these are all clearly stated in the opinion of the court, which is here given in full. The arguments turned more upon the propriety of granting the motion, than upon any strictly legal question; although the right of the accused to apply to the court for process to obtain any testimony whatever, at this stage of the case, was denied by the counsel for the United States. The discussion took a wide range, and the course of the government towards Col. Burr, and the conduct of Gen. Wilkinson in respect to him, were animadverted upon with much severity by counsel for the defence, and zealously defended by the counsel for the United States.

On the part of the prosecution it was insisted that the subpoena was unnecessary, because certified copies of any documents in the executive departments could be obtained by a proper application. It was said to be improper to call upon the president to produce the letter of Gen. Wilkinson, because it was a private letter, and probably contained confidential communications, which the president ought not and could not be compelled to disclose. It might contain state secrets, which could not be divulged without endangering the national safety. It was argued that the documents demanded could not be material to the defence, and objected that the affidavit did not even state, in positive terms, that they would be material.

On the part of the defence it was denied that any affidavit whatever was necessary to support the motion. The proposition that the president could withhold a paper material to the defence, merely because it contained confidential communications, was denied, and pronounced wholly untenable in law. If the letter considered state secrets which it would be inconsistent with the public safety to disclose, the president could say so in the return to the subpoena; but it was not to be assumed until he did say so. Or, if the letter contained anything of a confidential character, not relating to the case, the president could point out such parts as he did not wish to have exposed, and they need not be read in court. A copy of the letter, it was said, would not answer the purposes of the defence. Gen. Wilkinson was admitted to be the witness upon whom the prosecution mainly depended. His relation to the prosecution was such, that he had the strongest possible motive for bolstering it up; and if he failed in it, he would himself sink into irreparable disgrace. When he should come upon the stand to sustain a prosecution in which he had so much at stake, it might be of the utmost importance to confront him with his letter in his own handwriting. A copy would not do, because he might deny it; and no confidence was reposed by the defence in his integrity. The contents of the letter were only known to the defence by the president in a communication to congress. In that communication the president had stated that he had received a letter from Gen. Wilkinson in relation to the transactions of Mr. Burr, "of whose guilt," he says, "there can be no doubt." The president was severely censured (by Mr. Randolph) for thus assuming the functions of a judge, and pronouncing judgment against Mr. Burr in transacting his executive duties. The president had stated in said communication that Gen. Wilkinson had written at large to him respecting Mr. Burr. The defence wanted this letter, and had no doubt that in some of those things which Gen. Wilkinson had stated to the president, they would be able to trip him up.

As to the orders of the war and navy departments, it was said that certified copies would answer. But the secretary of the navy had already refused to furnish copies to one of Mr. Burr's counsel, on an application to him therefor, and they could not run the risk of another refusal. One of these orders (or what purported to be one) had been published in the Natchez Gazette, and it amounted to an order calling forth a military force to attack Mr. Burr and his associates, and destroy their property. It was contended that the president had no legal or constitutional power to issue such an order as this was represented to be; and if an unconstitutional and illegal order had been issued to destroy any man and his property, that man was justified in resisting it. Authenticated copies of these orders, therefore, might be necessary to defend Mr. Burr against any attempt to prove that he had resisted, or made any preparation to resist, the military forces

called forth against him. If no orders had been issued calling forth a military force to attack him, then he had a right to resist any such force as being a mere unauthorized mob. On these grounds it was of the utmost importance to the defence to know exactly what orders had been issued in relation to Col. Burr.

At the close of the discussion Mr. Hay said he had in his possession a copy of the very paper which had been so denounced by the counsel for cruelty and severity: the order issued by the secretary of the navy, which he proposed to read in order to show that there was no such thing in it. The opposite counsel desired to look at the paper, to ascertain whether it was the same they had seen in the *Natchez Gazette*; but Mr. Hay refused to let them take it. He finally put it up again, declaring that he believed it to be the same, but gentlemen did not want it to be read.

Before MARSHALL, Chief Justice, and GRIFFIN, District Judge.

MARSHALL, Chief Justice. The object of the motion now to be decided is to obtain copies of certain orders, understood to have been issued to the land and naval officers of the United States for the apprehension of the accused, and an original letter from General Wilkinson to the president in relation to the accused, with the answer of the president to that letter, which papers are supposed to be material to the defence. As the legal mode of effecting this object, a motion is made for a subpoena duces tecum, to be directed to the president of the United States. In opposition to this motion, a preliminary point has been made by the counsel for the prosecution. It has been insisted by them that, until the grand jury shall have found a true bill, the party accused is not entitled to subpoenas nor to the aid of the court to obtain his testimony. It will not be said that this opinion is now, for the first time, advanced in the United States; but certainly it is now, for the first time, advanced in Virginia. So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been, to permit any individual, who was charged with any crime, to prepare for his defence, and to obtain the process of the court, for the purpose of enabling him so to do. This practice is as convenient and a consonant to justice as it is to humanity. It prevents, in a great measure, those delays which are never desirable, which frequently occasion the loss of testimony, and which are often oppressive. That would be the inevitable consequence of withholding from a prisoner the process of the court, until the indictment against him was found by the grand jury. The right of an accused person to the process of the court to compel the attendance of witnesses seems to follow, necessarily, from the right to examine those witnesses; and, wherever the right exists, it would be reasonable that it should be accompanied with the means of rendering it effectual. It is not doubted that a person who appears before a court under a recognizance, must expect that a bill will be preferred against him, or that a question concerning the continuance of the recognizance will be brought before the court. In the first event, he has the right, and it is perhaps his duty, to prepare for his defence at the trial.

In the second event, it will not be denied that he possesses the right to examine witnesses on the question of continuing his recognizance. In either case it would seem reasonable that he should be entitled to the process of the court to procure the attendance of his witnesses. The genius and character of our laws and usages are friendly, not to condemnation at all events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such a trial. The objection that the attorney may refuse to proceed at this time, and that no day is fixed for the trial, if he should proceed, presents no real difficulty. It would be a very insufficient excuse to a prisoner, who had failed to prepare for his trial, to say that he was not certain the attorney would proceed against him. Had the indictment been found at the first term, it would have been in some measure uncertain whether there would have been a trial at this, and still more uncertain on what day that trial would take place; yet subpoenas would have issued returnable to the first day of the term; and if after its commencement other subpoenas had been required, they would have issued, returnable as the court might direct. In fact, all process to which the law affixed no certain return day is made returnable at the discretion of the court. General principles, then, and general practice are in favor of the right of every accused person, so soon as his case is in court, to prepare for his defence, and to receive the aid of the process of the court to compel the attendance of his witnesses.

The constitution and laws of the United States will now be considered for the purpose of ascertaining how they bear upon the question. The eighth amendment to the constitution gives to the accused, "in all criminal prosecutions, a right to a

speedy and public trial, and to compulsory process for obtaining witnesses in his favor." The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter. What can more effectually elude the right to a speedy trial than the declaration that the accused shall be disabled from preparing for it until an indictment shall be found against him? It is certainly much more in the true spirit of the provision which secures to the accused a speedy trial, that he should have the benefit of the provision which entitles him to compulsory process as soon as he is brought into court. This observation derives additional force from a consideration of the manner in which this subject has been contemplated by Congress.

It is obviously the intention of the national legislature, that in all capital cases the accused shall be entitled to process before indictment found. The words of the law are, "and every such person or persons accused or indicted of the crimes aforesaid, (that is, of treason or any other capital offense) shall be allowed and admitted in his said defence to make any proof that he or they can produce by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial as is usually granted to compel witnesses to appear on the prosecution against them." This provision is made for persons accused or indicted. From the imperfection of human language, it frequently happens that sentences which ought to be the most explicit are of doubtful construction; and in this case the words "accused or indicted" may be construed to be synonymous, to describe a person in the same situation, or to apply to different stages of the prosecution. The word "or" may be taken in a conjunctive or a disjunctive sense. A reason for understanding them in the latter sense is furnished by the section itself. It commences with declaring that any person who shall be accused and indicted of treason shall have a copy of the indictment, and at least three days before his trial. This right is obviously to be enjoyed after an indictment, and therefore the words are, "accused and indicted." So with respect to the subsequent clause, which authorizes a party to make his defence, and directs the court, on his application, to assign him counsel. The words relate to any person accused and indicted. But, when the section proceeds to authorize the compulsory process for witnesses, the phraseology is changed. The words are, "and every such person or persons accused or indicted," &c., thereby adapting the expression to the situation of an accused person both before and after indictment. It is to be remarked, too, that the person so accused or indicted is to have "the like process to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against him." The fair construction of this clause would seem to be, that with respect to the means of compelling the attendance of witnesses to be furnished by the court, the prosecution and defence are placed by the law on equal ground. The right of the prosecutor to take out subpoenas, or to avail himself of the aid of the court, in any stage of the proceedings previous to the indictment, is not controverted. This act of congress, it is true, applies only to capital cases: but persons charged with offences not capital have a constitutional and a legal right to examine their testimony; and this act ought to be considered as declaratory of the common law in cases where this constitutional right exists.

Upon immemorial usage, then, and upon what is deemed a sound construction of the constitution and law of the land, the court is of opinion that any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses. Much delay and much inconvenience may be avoided by this construction; no mischief, which is perceived, can be produced by it. The process would only issue when, according to the ordinary course of proceeding, the indictment would be tried at the term to which the subpoena is made returnable: so that it becomes incumbent on the accused to be ready for his trial at that term.

This point being disposed of, it remains to inquire whether a subpoena duces tecum can be directed to the president of the United States, and whether it ought to be directed in this case? This question originally consisted of two parts. It was at first doubted whether a subpoena could issue, in any case, to the chief magistrate of the nation; and if it could, whether that subpoena could do more than direct his personal attendance; whether it could direct him to bring with him a paper which was to constitute the gist of his testimony. While the argument was opening, the attorney for the United States avowed his opinion that a general subpoena might issue to the president; but not a subpoena duces tecum.

This terminated the argument on that part of the question. The court, however, has thought it necessary to state briefly the foundation of its opinion, that such a subpoena may issue. In the provisions of the constitution, and of the statute, which give to the accused a right to the compulsory process of the court, there is no exception whatever. The obligation, therefore, of those provisions is general; and it would seem that no person could claim an exemption from them, but one who would not be a witness. At any rate, if an exception to the general principle exist, it must be looked for in the law of evidence. The exceptions furnished by the law of evidence, (with one only reservation,) so far as they are personal, are of those only whose testimony could not be received. The single reservation alluded to is the case of the king. Although he may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate in England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the constitution of the United States, the president, as well as any other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors.

By the constitution of Great Britain, the crown is hereditary, and the monarch can never be a subject. By that of the United States, the president is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again. How essentially this difference of circumstances must vary the policy of the laws of the two countries, in reference to the personal dignity of the executive chief, will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of a state; at any rate, under the former Confederation; and it is not known ever to have been doubted, but that the chief magistrate of a state might be served with a subpoena ad testificandum. If, in any court of the United States, it has ever been decided that a subpoena cannot issue to the president, that decision is unknown to this court.

If, upon any principle, the president could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting; and, if it should exist at the time when his attendance on a court is required, it would be shown on the return of the subpoena, and would rather constitute a reason for not obeying the process of the court than a reason against its being issued. In point of fact it cannot be doubted that the people of England have the same interest in the service of the executive government, that is, of the cabinet counsel, that the American people have in the service of the executive of the United States, and that their duties are as arduous and as unremitting. Yet it has never been alleged, that a subpoena might not be directed to them. It cannot be denied that to issue a subpoena to a person filling the exalted position of the chief magistrate is a duty which would be dispensed with more cheerfully than it would be performed; but, if it be a duty, the court can have no choice in the case. If, then, as is admitted by the counsel for the United States, a subpoena may issue to the president, the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it.

The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued. If, in being summoned to give his personal attendance to testify, the law does not discriminate between the president and a private citizen, what foundation is there for the opinion that this difference is created by the circumstance that his testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing? The court can perceive no foundation for such an opinion. The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it. A subpoena duces tecum, then, may issue to any person to whom an ordinary subpoena may issue, directing him to bring any paper of which the party praying it has a right to avail himself as testimony; if, indeed, that be the necessary process for obtaining the view of such a paper. When this subject was suddenly introduced, the court felt some doubt concerning the propriety of directing a subpoena to the chief magistrate,

and some doubt also concerning the propriety of directing any paper in his possession, not public in its nature, to be exhibited in court. The impression that the questions which might arise in consequence of such process, were more proper for discussion on the return of the process than on its issuing, was then strong on the mind of the judges; but the circumspection with which they would take any step which would in any manner relate to that high personage, prevented their yielding readily to those impressions, and induced the request that those points, if not admitted, might be argued. The result of that argument is a confirmation of the impression originally entertained. The court can perceive no legal objection to issuing a subpoena duces tecum to any person whatever, provided the case be such as to justify the process. This is said to be a motion to the discretion of the court. This is true. But a motion to its discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.

A subpoena duces tecum varies from an ordinary subpoena only in this; that a witness is summoned for the purpose of bringing with him a paper in his custody. In some of our sister states whose system of jurisprudence is erected on the same foundation with our own, this process, we learn, issues of course. In this state it issues, not absolutely of course, but with leave of the court. No case, however, exists as is believed, in which the motion has been founded on an affidavit, in which it has been denied, or in which it has been opposed. It has been truly observed that the opposite party can, regularly, take no more interest in the awarding a subpoena duces tecum than in the awarding of an ordinary subpoena. In either case he may object to any delay, the grant of which may be implied in granting the subpoena; but he can no more object regularly to the legal means of obtaining testimony, which exists in the papers, than in the mind of the person who may be summoned. If no inconvenience can be sustained by the opposite party, he can only oppose the motion in the character of an *amicus curiae*, to prevent the court from making an improper order, or from burthening some officer by compelling an unnecessary attendance. This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence. The literal distinction which exists between the cases is too much attenuated to be countenanced in the tribunals of a just and humane nation. If, then, the subpoena be issued without inquiry into the manner of its application, it would seem to trench on the privileges which the constitution extends to the accused; it would seem to reduce his means of defence within narrower limits than is designed by the fundamental law of our country, if an overstrained rigor should be used with respect to his right to apply for papers deemed by himself to be material. In the one case the accused is made the absolute judge of the testimony to be summoned; if, in the other, he is not a judge, absolutely for himself, his judgment ought to be controlled only so far as it is apparent that he means to exercise his privileges not really in his own defence, but for purposes which the court ought to discountenance. The court would not lend its aid to motions obviously designed to manifest disrespect to the government; but the court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material in his defence.

These observations are made to show the nature of the discretion which may be exercised. If it be apparent that the papers are irrelative to the case, or that for state reasons they cannot be introduced into the defence, the subpoena duces tecum would be useless. But, if this be not apparent, if they may be important in the defence, if they may be safely read at the trial, would it not be a blot in the page which records the judicial proceedings of this country, if, in a case of such serious import as this, the accused should be denied the use of them? The counsel for the United States takes a very different view of the subject, and insist that a motion for process to obtain testimony should be supported by the same full and explicit proof of the nature and application of that testimony, which would be required on a motion, which would delay public justice, which would arrest the ordinary course of proceeding, or would in any other manner affect the rights of the opposite party. In favor of this position has been urged the opinion of one, whose loss as a friend and as a judge I sincerely deplore; whose worth I feel, and whose authority I shall at all times generally respect. If his opinions were really opposed to mine, I should certainly revise, deliberately revise, the judgment I had formed; but I perceive no such opposition.

In the trials of Smith and Ogden [U.S. v. Smith, Case No. 16,342], the court in which Judge Patterson presided, required a special affidavit in support of a motion made by the counsel for the accused for a continuance and for an

attachment against witnesses who had been subpoenaed and who had failed to attend. Had this requisition of a special affidavit been made as well a foundation for an attachment as for a continuance, the case would not have been parallel, because the attachment was considered by the counsel for the prosecution merely as a means of punishing the contempt, and a court might certainly require stronger testimony to induce them to punish a contempt, than would be required to lend its aid to a party in order to procure evidence in a cause. But the proof furnished by the case is most conclusive that the special statements of the affidavit were required solely on account of the continuance. Although the counsel for the United States considered the motion for an attachment merely as a mode of punishing for contempt, the counsel for Smith and Ogden considered it as compulsory process to bring in a witness, and moved a continuance until they could have the benefit of this process.

The continuance was to arrest the ordinary course of justice; and, therefore, the court required a special affidavit, showing the materiality of the testimony before this continuance could be granted. *Prima facie* the evidence could not apply to the case; and there was an additional reason for a special affidavit. The object of this special statement was expressly said to be for a continuance. Colden proceeded: "The present application is to put off the cause on account of the absence of witnesses, whose testimony the defendant alleges is material for his defence, and who have disobeyed the ordinary process of the court. In compliance with the intimation from the bench yesterday, the defendant has disclosed by the affidavit which I have just read, the points to which he expects the witnesses who have been summoned will testify. If the court cannot or will not issue compulsory process to bring in the witnesses who are the objects of this application, then the cause will not be postponed. Or, if it appears to the court, that the matter disclosed by the affidavit might not be given in evidence, if the witness were now here, then we cannot expect that our motion will be successful. For it would be absurd to suppose that the court will postpone the trial on account of the absence of witnesses whom they cannot compel to appear, and of whose voluntary attendance there is too much reason to despair; or, on account of the absence of witnesses who, if they were before the court, could not be heard on the trial." See the trials of Smith and Ogden [*supra*]. This argument states, unequivocally, the purpose for which a special affidavit was required.

The counsel for the United States considered the subject in the same light. After exhibiting an affidavit for the purpose of showing that the witnesses could not probably possess any material information. Mr. Standford said: "It was decided by the court yesterday that it was incumbent on the defendant, in order to entitle himself to a postponement of the trial on account of the absence of these witnesses, to show in what respect they are material for his defence. It was the opinion of the court that the general affidavit, in common form, would not be sufficient for this purpose, but that the particular facts expected from the witnesses must be disclosed in order that the court might, upon those facts, judge of the propriety of granting the postponement."

The court frequently treated the subject so as to show the opinion that the special affidavit was required only on account of the continuance; but what is conclusive on this point is, that after deciding the testimony of the witnesses to be such as could not be offered to the jury. Judge Patterson was of opinion that a rule, to show cause why an attachment should not issue, ought to be granted. He could not have required the materiality of the witness to be shown on a motion, the success of which did not, in his opinion, in any degree depend on that materiality; and which he granted after deciding the testimony to be such as the jury ought not to hear. It is, then, most apparent that the opinion of Judge Patterson has been misunderstood, and that no inference can possibly be drawn from it, opposed to the principle which has been laid down by the court. That principle will therefore be applied to the present motion.

The first paper required is the letter of General Wilkinson, which was referred to in the message of the president to congress. The application of that letter to the case is shown by the terms in which the communication was made. It is a statement of the conduct of the accused made by the person who is declared to be the essential witness against him. The order for producing this letter is opposed:

First, because it is not material to the defense. It is a principle, universally acknowledged, that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the

witness will say; for if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. Those former declarations, therefore, constitute a mass of testimony, which a party has a right to obtain by way of precaution, and the positive necessity of which can only be decided at the trial. It is with some surprise an argument was heard from the bar, insinuating that the award of a subpoena on this ground gave the countenance of the court to suspicions affecting the veracity of a witness who is to appear on the part of the United States. This observation could not have been considered. In contests of this description, the court takes no part; the court has no right to take a part. Every person may give in evidence, testimony such as is stated in this case. What would be the feelings of the prosecutor if, in this case, the accused should produce a witness completely exculpating himself, and the attorney for the United States should be arrested in his attempt to prove what the same witness had said upon a former occasion, by a declaration from the bench that such an attempt could not be permitted, because it would imply a suspicion in the court that the witness had not spoken the truth? Respecting so unjustifiable an interposition but one opinion would be formed.

The second objection is, that the letter contains matter which ought not to be disclosed. That there may be matter, the production of which the court would not require, is certain; but, in a capital case, that the accused ought, in some form, to have the benefit of it, if it were really essential to his defense, is a position which the court would very reluctantly deny. It ought not to be believed that the department which superintends prosecutions in criminal cases, would be inclined to withhold it. What ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country. At present, it need only be said that the question does not occur at this time. There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety. If it does contain such matter, the fact may appear before the disclosure is made. If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed. It is not easy to conceive that so much of the letter as relates to the conduct of the accused can be a subject of delicacy with the president. Everything of this kind, however, will have its due consideration on the return of the subpoena.

Thirdly, it has been alleged that a copy may be received instead of the original, and the act of congress has been cited in support of this proposition. This argument presupposes that the letter required is a document filed in the department of state, the reverse of which may be and most probably is the fact. Letters addressed to the president are most usually retained by himself. They do not belong to any of the departments. But, were the facts otherwise, a copy might not answer the purpose. The copy would not be superior to the original, and the original itself would not be admitted, if denied, without proof that it was in the handwriting of the witness. Suppose the case put at the bar of an indictment on this letter for a libel, and on its production it should appear not to be in the handwriting of the person indicted. Would its being deposited in the department of state make it his writing, or subject him to the consequence of having written it? Certainly not. For the purpose, then, of showing the letter to have been written by a particular person, the original must be produced, and a copy could not be admitted. On the confidential nature of this letter much has been said at the bar, and authorities have been produced which appear to be conclusive. Had its contents been orally communicated, the person to whom the communications were made could not have excused himself from detailing them, so far as they might be deemed essential in the defence. Their being in writing gives no additional sanctity; the only difference produced by the circumstance is, that the contents of the paper must be proved by the paper itself, not by the recollection of the witness.

Much has been said about the disrespect to the chief magistrate, which is implied by this motion, and by such a decision of it as the law is believed to require. These observations will be very truly answered by the declaration that this court feels many, perhaps, peculiar motives for manifesting as guarded a respect for the chief magistrate of the Union as is compatible with its official duties. To go beyond these would exhibit a conduct which would deserve some other appellation than the term respect. It is not for the court to anticipate the event of the present prosecution. Should it terminate as is expected on the part of the United States, all those who are concerned in it should certainly

regret that a paper which the accused believed to be essential to his defence, which may, for aught that now appears, be essential, had been withheld from him. I will not say, that this circumstance would, in any degree, tarnish the reputation of the government; but I will say, that it would justly tarnish the reputation of the court which had given its sanction to its being withheld. Might I be permitted to utter one sentiment, with respect to myself, it would be to deplore, most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare, on the information now possessed, that the accused is not entitled to the letter in question if it should be really important to him.

The propriety of reporting the answer to this letter is more questionable. It is alleged that it most probably communicates orders showing the situation of this country with Spain, which will be important on the misdemeanor. If it contain matter not essential to the defence, and, the disclosure be unpleasant to the executive, it certainly ought not to be disclosed. This is a point which will appear on the return. The demand of the orders which have been issued, and which have been, as is alleged, published in the Natchez Gazette, is by no means unusual. Such documents have often been produced in the courts of the United States and the courts of England. If they contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear upon the return. If they do not, and are material, they may be exhibited. It is said they cannot be material, because they cannot justify any unlawful restriction which may have been employed or meditated by the accused. Were this admitted, and were it also admitted that such resistance would amount to treason, the orders might still be material; because they might tend to weaken the endeavor to connect such overt act with any overt act of which this court may take cognizance. The court, however, is rather inclined to the opinion that the subpoena in such case ought to be directed to the head of the department in whose custody the orders are. The court must suppose that the letter of the secretary of the navy, which has been stated by the attorney for the United States, to refer the counsel for the prisoner to his legal remedy for the copies he desired, alluded to such a motion as is now made.

The affidavit on which the motion is grounded has not been noticed. It is believed that such a subpoena, as is asked, ought to issue, if there exist any reason for supposing that the testimony may be material, and ought to be admitted. It is only because the subpoena is to those who administer the government of this country, that such an affidavit was required as would furnish probable cause to believe that the testimony was desired for the real purposes of defence, and not for such as this court will forever discountenance.

McGRAIN *v.* DAUGHERTY.

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Syllabus.

McGRAIN *v.* DAUGHERTY.APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO.

No. 28. Argued December 5, 1924.—Decided January 17, 1927.

1. Deputies, with authority to execute warrants, may be appointed by the Sergeant-at-Arms of the Senate, under a standing order of the Senate, such appointments being sanctioned by practice and by acts of Congress fixing the compensation of the appointees and providing for its payment. P. 154.
2. Such deputy may serve a warrant of attachment issued by the President of the Senate and addressed only to the Sergeant-at-Arms, in pursuance of a Senate resolution contemplating service by either. P. 155.
3. A warrant of the Senate for attachment of a person who ignored a subpoena from a Senate committee, is supported by oath within the requirement of the Fourth Amendment when based upon the committee's report of the facts of the contumacy, made on the committee's own knowledge and having the sanction of the oath of office of its members. P. 156.
4. Subpoenas issued by a committee of the Senate to bring before it a witness to testify in an investigation authorized by the Senate, are as if issued by the Senate itself. P. 158.
5. Therefore, in case of disobedience, the fact that the subpoena, and the contumacy, related only to testimony sought by a committee, is not a valid objection to a resolution of the Senate, and warrant issued thereon, requiring the defaulting witness to appear before the bar of the Senate itself, then and there to give the desired testimony. P. 158.
6. Each house of Congress has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution. P. 160.
7. This has support in long practice of the houses separately, and in repeated Acts of Congress, all amounting to a practical construction of the Constitution. Pp. 161, 167, 174.
8. The two houses of Congress in their separate relations have not only such powers as are expressly granted them by the Constitution, but also such auxiliary powers as are necessary and appro-

priate to make the express powers effective, but neither is invested with "general" power to inquire into private affairs and compel disclosures. P. 173.

9. A witness may rightfully refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry. P. 176.
10. A resolution of the Senate directing a committee to investigate the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers, specific instances of alleged neglect being recited,—concerned a subject on which legislation could be had which would be materially aided by the information which the investigation was calculated to elicit. P. 176.
11. It is to be presumed that the object of the Senate in ordering such an investigation is to aid it in legislating. P. 178.
12. It is not a valid objection to such investigation that it might disclose wrong-doing or crime by a public officer named in the resolution. P. 179.
13. A resolution of the Senate, directing attachment of a witness who had disobeyed a committee subpoena to such an investigation, and declaring that his testimony is sought with the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper," supports the inference, from the earlier resolution, of a legislative object. The suggestion of "other action" does not overcome the other part of the declaration and thereby invalidate the attachment proceedings. P. 180.
14. In view of the character of the Senate as a continuing body, and its power to continue or revive, with its original functions, the committee before which the investigation herein involved was pending, the question of the legality of the attachment of the respondent as a contumacious witness did not become moot with the expiration of the Congress during which the investigation and the attachment were ordered. P. 180.

299 Fed. 620, reversed.

APPEAL from a final order of the District Court, in *habeas corpus*, discharging the respondent, Mally S.

Daugherty, from the custody of John J. McGrain, Deputy Sergeant at Arms of the Senate, by whom he had been arrested, as a contumacious witness, under a warrant of attachment, issued by the President of the Senate in pursuance of a Senate resolution.

Mr. George W. Wickersham, Special Assistant to the Attorney General, with whom *Attorney General Stone* and *Mr. William T. Chantland*, Special Assistant to the Attorney General, were on the brief, for the appellant.

Each House of Congress has power to conduct an investigation in aid of its legislative functions, to compel attendance before it of witnesses and the production of books and papers which may throw light upon the subject of inquiry; subject, of course, to protection against the invasion of such privileges as those against unreasonable searches and seizures, self-incrimination and the like. This power is for the purpose of aiding each House more fitly to discharge its legislative duties. The investigation ordered by the Senate resolution of March 1st was of that character; and the court below erred in the construction it put upon the resolution and in holding the entire proceeding void. For many years it has been the practice of both Houses of Congress to conduct investigations into matters of public interest within the general domain of federal jurisdiction, and to summon witnesses to appear and give testimony and produce books and papers bearing upon the questions under investigation. See §§ 102 and 104, Revised Statutes. The power of the respective Houses to compel the attendance and testimony of witnesses in order to secure information necessary or useful to enable them to perform their legislative functions was thus recognized by law, and defiance of that power made punishable as a crime against the United States. This was without impairing in the slightest the right of a House to employ the power regarding contempt to compel obedi-

ence to its orders. *In re Chapman*, 166 U. S. 661. The power of each House was asserted from the beginning, not because it was exercised by the House of Commons in England, but because it is "necessary or proper for carrying into execution" the powers vested by the Constitution in Congress, and each House thereof.

In December, 1859, the Senate, by resolution, appointed a committee to inquire into the facts concerning the invasion and seizure of the armory and arsenal at Harper's Ferry and to report facts and recommend legislation, the committee to have power to send for persons and papers. In February, 1860, a resolution was adopted directing the Sergeant-at-Arms to take into his custody the body of Thaddeus Hyatt, and to have the same forthwith before the bar of the Senate to answer as for a contempt of its authority. Pursuant to this resolution, Hyatt was brought before the bar, and a resolution was adopted, after a long debate, by a vote of 44 ayes and 10 noes, directing him to be committed by the Sergeant-at-Arms to the common jail of the District of Columbia, to be kept in close custody until he should signify his willingness to answer the questions propounded by the Senate. *Con. Globe*, 1st Sess. 36th, pp. 1102, 1105. In upholding the existence of the power, the Senate did not divide on sectional lines, and the vote was overwhelmingly in support of the asserted power.

The question seems never to have been squarely decided in this Court. In some cases, the point was expressly reserved for future decision; in others there are expressions of opinion strongly favoring the existence of the power. *Kilbourn v. Thompson*, 103 U. S. 168. See *Burnham v. Morrissey*, 14 Gray, (Mass.) 226; *Anderson v. Dunn*, 6 Wheat. 204.

The Massachusetts court in the above case did not reach its conclusions from any analogy to the privileges of Parliament, nor from any residuum of power left in

the legislature because not taken away by the state constitution. The power was recognized as necessary to the functions expressly delegated to the legislature by the constitution. The same principle is equally applicable to each House of Congress under the Constitution of the United States.

The point was reserved, in *Harriman v. Interstate Commerce Comm.*, 211 U. S. 407, and *Henry v. Henkel*, 235 U. S. 219. *Kilbourn v. Thompson*, *supra*, and *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447, seem slightly hostile to such a power. *Marshall v. Gordon*, 243 U. S. 521, 543, contains an argumentative dictum in favor of the right. See the instances of legislative action cited, with approval, on the margin of the report. Cf. *Hinds' Precedents*, Vol. 3: 21, 24.

A final proof that the express constitutional grant of certain judicial powers to Congress, or a House thereof, does not negative the implication of further powers of that nature, (See *Anderson v. Dunn*, 6 Wheat. at p. 232,) exists in the fact that the Constitution expressly forbids the exercise of the parliamentary judicial power of passing bills of attainder. Art. I, § 9. Where there are both express grants and express prohibitions, the application of the principle *expressio unius* is self-contradictory, and so the field is left clear for ordinary implication with no bias *ab initio* against it.

The matter in the *Kilbourn* case was a settled debt, an executed transaction, one that should not be undone by legislative but only by judicial act, if at all, and which was being considered in the District Court which was the proper forum of the bankruptcy proceedings. *In re Chapman*, 166 U. S. 661, is of value here chiefly for the presumption of validity conceded to the Senate's resolution. The opinion shows that the usual presumption of validity of legislative acts applies to the resolution of a single House, indicates a qualification on the *Kilbourn* case, and

disposes of the District Court's point in the present case, that a legislative purpose was not expressly averred in the original resolution but only in the one directing Daugherty's arrest. It also shows that that case is not to be distinguished on the ground that the proceedings were under the statute, but that the Senate could have proceeded directly.

In *Marshall v. Gordon*, 243 U. S. 521, "the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties" (p. 546). That is to say, while the right to punish contempts obstructing legislation was upheld, the letter sent by Marshall was not deemed to amount to an obstruction.

The rule to be derived from these contempt cases may be summarized thus: in addition to the express power to "punish its members for disorderly behavior," Constitution, Art. I, § 5, each House has an implied power to punish outsiders for contempts, *Anderson v. Dunn*, *supra*; but no such power is implied in aid of a proceeding outside the jurisdiction of the House, *Kilbourn v. Thompson*, *supra*; however, a presumption of validity attaches to a resolution of either House, just as to legislation of both Houses jointly, so that all doubts are to be resolved in its favor, *In re Chapman*, and an investigation of a public officer or department is therefore presumed legislative in purpose and therefore valid until the contrary is shown, *Marshall v. Gordon*, *semble*.

The power rests upon the well-settled rule of unexpressed power necessary or proper to the exercise of express powers, being recognized by the Courts as necessarily a part of the constitutional grant. The leading case of course is *McCulloch v. Maryland*, 4 Wheat. 316. That the principle of that case justifies the implication in favor of either House of Congress having power to punish contempts, is recognized in *Marshall v. Gordon*, p. 537. Multiplication of the cases following *McCulloch v. Maryland*, or of the practical arguments to show that the

gathering of information by the compulsion of contempt proceedings is appropriate, if not imperative, for legislation under modern conditions, seems unnecessary.

A similar question arises where boards or commissions exercising delegated legislative power seek to compel testimony and the production of documents in the aid of its exercise. *Harriman v. Interstate Commerce Comm.*, 211 U. S. 407, and the language of the majority opinion is qualified by *Smith v. Interstate Commerce Comm.*, 245 U. S. 33. While the cases last cited are not controlling, they indicate a trend away from the idea expressed in the earlier cases and the opinion in the court below, that testimony can be compelled only in an investigation into a specific breach of existing law—a judicial inquiry. Furthermore, the case for a House of Congress investigating by its own committee is much stronger than that of an administrative body acting under delegated powers.

The question of the power of either House to compel testimony in aid of legislation has not been decided adversely in any of the inferior federal courts. See *Ex Parte Nugent*, Fed. Cas., 10375 (1848); *In re Pacific Railway Comm.*, 32 Fed., 241; *Henry v. Henkel*, *supra*; and 207 Fed. 805; *Briggs v. Mackeller*, 2 Abbott's Practice, N. Y., 30; *United States v. Sinclair*, 52 Wash L. Rep. 451 [July, 1924].

A number of state court decisions have upheld the existence of the power here contended for. *Briggs v. Mackellar*, 2 Abbott's Practice, N. Y., 30 (1835); *People v. Keeler*, 99 N. Y. 463 (1885); *Matter of Barnes*, 204 N. Y. 108 (1912); *Burnham v. Morrissey*, 14 Gray 226; *State v. Guilbert*, 75 Ohio St. 1, distg.; *State v. Brewster*, 89 N. J. L. 658 (1916); *In re Falvey*, 7 Wis. 630 (1858); *Ex parte Parker*, 74 S. C. 466 (1906).

It is submitted that the District Court's distinction between the rule which obtains in States where the whole legislative power is vested in the legislature and those

where all powers not expressly granted are reserved to the people, is wholly unsound in its application to the powers of Congress under the Constitution. The rule finally worked out by the courts and expressed by Chief Justice White in *Marshall v. Gordon, supra*, is based upon the doctrine of the grant by the Constitution of all powers necessary or proper to the use of the powers expressly granted. Each House has power to do whatever is customarily required to enable it intelligently to participate in the making of laws. Such implied power cannot be reserved to the States, respectively, or to the people, for it can only be exercised by the House itself. If it be not vested in such House, it exists nowhere. That it does exist in each House, and constantly has been exercised for nearly a century past, is abundantly demonstrated.

The English cases dealing with the powers of the House of Commons to compel testimony and punish for contempt of its process are interesting as furnishing an historical background but are not otherwise of great importance, their authority having been rejected by the Supreme Court (*Kilbourn v. Thompson, supra*), disregarded in Massachusetts and rejected in New York, both of which uphold the power (*Burnham v. Morrissey, supra*, *People v. Keeler*, 99 N. Y. 463, 473,) and rejected in Ohio which denies it (*State v. Guilbert, supra*), *Regina v. Paty*, 2 Ld. Raym., 1105; *Murray's case*, 1 Wils. 299; *Brass Crosby's Case*, 3 Wils., 188; *Rex v. Flower*, 8 T. R., 314; *Burdett v. Abbott*, 14 East, 1; *Stockdale v. Hansard*, 9 Ad. & E. 1; *Stockdale v. Hansard*, 11 Ad. & E. 253; *Case of Sheriff of Middlesex*, 11 Ad. & E. 273.

Colonial Cases: *Baumont v. Barrett*, 1 Moo. P. C., 59; *Kielley v. Carson*, 4 Moo. P. C., 63; *Fenton v. Hampton*, 11 Moo. P. C. 347; *Doyle v. Falconer*, L. R., 1 P. C., 328; *Ex parte Dansereau*, XIX Lower Canada Jurist, 210; *Ex parte Brown*, 5 B. & S., 280.

The investigation ordered by the Senate, in the course of which the testimony of Appellee and the production of

books and records of the bank of which he is president were required, was legislative in its character. The investigation of the Attorney General's office was the exact action ordered. It is impossible to separate the person occupying that office, and his assistants, from the office; and the resolution of March 1st directed the committee to investigate circumstances and facts concerning the alleged failure of the Attorney General to prosecute and defend cases wherein the Government of the United States was interested, and to inquire into his activities and those of his assistants in the Department, which would in any manner tend to impair their efficiency or influence as representatives of the Government. The resolution of April 26th, by which the issuance of a warrant was ordered to bring the body of the Appellee before the bar of the Senate, then and there to answer questions pertinent to the matter under inquiry, is predicated upon a recital that "the appearance and testimony of the said M. S. Daugherty is material and necessary in order that the committee may properly execute the functions imposed upon it and may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." See *Chapman* case, 166 U. S. 661; *People v. Keeler*, *supra*; *Kilbourn v. Thompson*, *supra*; *In re Falvey*, *supra*; *People v. Webb*, 5 N. Y. Supp., 855; *People v. Milliken*, 185 N. Y. 35; *Matter of Barnes*, *supra*;

The Department of Justice is one of the great executive branches of the Government. It is created by statute (Rev. Stats., Title VIII). The duties of the Attorney General and his assistants are in great measure defined by law. Annually Congress, with the concurrence of both Houses, appropriates large sums of money to be expended for the purpose of enforcing the law or defending the Government against claims in the courts, under the direction of the Attorney General and his assistants. Can it

possibly be said that the discovery of any facts showing the neglect or failure of the Attorney General or his assistants properly to discharge the duties imposed upon them by law cannot be and would not naturally be used by Congress as the basis for new legislation safeguarding the interests of the Government and making more improbable in the future the commission of any illegal or improper acts which might be shown to have been committed in the past? Appellee by refusing to appear in response to either subpoena and be sworn to testify, can only succeed in this case by establishing that the entire proceeding was void as beyond the constitutional powers of the Senate. Questions as to the materiality or relevancy of evidence are for later consideration.

Messrs. Arthur I. Vorys and John P. Phillips, with whom Mr. Webb I. Vorys was on the brief, for the appellee.

The arrest is the result of an attempt of the Senate to vest its committee with judicial power in a case which is not among those specifically enumerated. The court must determine the nature of the power which the Senate is attempting to exercise, and is not concluded by any *post litem* avowal made after the summons was issued, served and resisted, and after a court of competent jurisdiction had enjoined the exercise of the power. In *Kilbourn v. Thompson*, 103 U. S. 168, *In re Chapman*, 166 U. S. 661, and *Marshall v. Gordon*, 243 U. S. 521, this court examined the resolutions under which the investigations were being conducted and found that they were sufficient to exhibit the nature of the investigations and the purpose of the investigators. But the court is not limited to the formal words of this resolution, for it is the fact which is determinative and which this court must find. What the Senate intends to do and in fact is doing determines the character of its proceeding. It can not

be said that, as the Senate has not declared what it intends to do at the conclusion of the investigation, therefore the investigation is not judicial and not executive, and consequently it must be legislative in character. Nor that, as the Senate at the end of the investigation can do nothing in a judicial or executive capacity, therefore it must be assumed that its action, if any, will be in a legislative capacity.

The preamble of Senate Resolution No. 157, which clearly indicates its purpose, was stricken out upon final passage of the resolution, not because the purpose of the Senate had changed in any particular but because the Senate did not desire to condemn the Attorney General without a trial. Throughout the debate upon the resolution the idea recurs constantly that the Attorney General is to be placed on trial. There is no suggestion of legislative action, or in fact of any action other than the ascertainment of facts with respect to the charges of malfeasance in office of Harry M. Daugherty and the publication of the same for the purpose of forcing him to resign. Only twice during the whole debate was there any pretense that the investigators were to engage in anything other than a trial of Mr. Daugherty.

The committee has assumed all of the functions of prosecutor, judge and jury with apparently none of the customary rules governing evidence and procedure. The court, however, need go no further than the resolution which, in apt words, reposes in the investigating committee judicial duties, and judicial duties alone. The personal cast of the resolution, the inability of the committee to do anything except to try the facts concerning the charges contained in the resolution and the total inability of the Senate to use the findings of the investigating committee for any purpose other than to pillory Harry M. Daugherty before the American people, clearly demonstrate that the proceeding is an attempt to usurp the

judicial function. Of most important significance, is the fact that the first hint of any pretense that this inquisition was being conducted for legislative purposes was the *ex post facto* recital of a "basis for such legislation and other action" in the resolution of April 26, 1924, authorizing a warrant for the arrest of the appellee. This afterthought was inserted after the proceeding and injunction in the Fayette County Court and when the Senate knew that the validity of its resolution had been challenged in that proceeding on the ground that it conferred judicial authority. The Senate of the United States cannot override the constitutional rights of a private citizen by a mere additional word or gesture.

The Senate when acting in its legislative capacity has no power to arrest in order to compel testimony; the Senate can compel testimony only in cases where it has judicial power specifically granted by the Constitution. Any argument which begins with an assertion that citizens owe a duty to give testimony and thereupon asserts that Congress, or a branch thereof, may enforce this duty by its own processes, will result in nullifying the express division of powers among the three branches of government.

At the time our Constitution was adopted the process of arrest resided solely in the judiciary. *Marshall v. Gordon*, 243 U. S. 521, 533. In England the power to arrest and punish was retained by the House of Commons because of ancient privilege and prescription and not because of legislative right. The power of arrest has never been accorded to inferior legislative or administrative bodies. In the few instances in which such an attempt has been made, the power has been denied whenever it has been challenged in the courts. *Langenberg v. Decker*, 131 Ind. 471; *Re Sims*, 54 Kans. 1; *Kielley v. Carson*, 4 Moore P. C. 63; *Fenton v. Hampton*, 11 Moore

P. C. 347; *Ex Parte Dansereau*, 19 Lower Canada Jurist, 210.

This Court has never decided that the Congress, or either branch of it, has power, in its legislative capacity, to cause the arrest of a witness in order to compel him to testify. The intimations of the learned jurists to the contrary are so plain that it is impossible to piece out what opposing counsel have called "expressions strongly favoring the existence of the power." *Kilbourn v. Thompson*, 103 U. S. 168; *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447; *In re Chapman*, 166 U. S. 661; *Harriman v. Interstate Commerce Comm.*, 211 U. S. 407; *Marshall v. Gordon*, *supra*; *Boyd v. United States*, 116 U. S. 616; *Ellis v. Interstate Commerce Comm.*, 237 U. S. 434; *Federal Trade Comm. v. American Tobacco Co.*, 264 U. S. 298; *Ex parte Nugent*, Fed. Cas. 10375; *Re Pacific Ry. Comm.*, 32 Fed. 250; *Smith v. Interstate Commerce Comm.*, 245 U. S. 33.

Congress, under the Federal Constitution, has only those powers which are granted to it, but many of the state legislatures differ from the English Parliament only in the degree of their powers, having all powers not expressly or impliedly denied by the state constitutions. From this it follows that the same canons of interpretation do not apply to the state legislatures and the national Congress. *People v. Keeler*, 99 N. Y. 463; *Ex Parte Parker*, 74 S. C. 466; *Burnham v. Morrissey*, 14 Gray (Mass.) 226; *Whitcomb's Case*, 120 Mass. 118. Those who have contended that the power to compel testimony is a legislative power have urged it as a necessity. The proponents of this argument resort to the famous definition and amplification of the word "necessary" of Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 306. The reasoning is fallacious and circuitous. Marshall was considering the power of the United States to establish a national bank. He referred to Clause 18

of Article I, § 8 of the Constitution, in which Congress was given power to make laws which shall be necessary and proper for carrying into execution the powers expressly given. He was not implying a grant of power which, because it might be convenient, or appropriate in the exercise of another power, would therefore be permitted to override the constitutional guaranties of the private citizen. In the cases which have followed and adopted Mr. Chief Justice Marshall's definition, no case has implied such a grant from convenience so as to override the express guaranties of the Bill of Rights contained in the first ten Amendments. Not even when Congress is given an express power can that power be exercised in derogation of the express guaranties of individual liberty. *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447. If Congress has no such power where there is a specific grant, certainly Congress cannot destroy personal guaranties through any implied grant incidental to the general power to enact laws. The only satisfactory determination of the substantive question in this case should be that the power to arrest a recusant witness is a judicial process and confined to the jurisdiction of the courts, and that the Senate has no power to arrest a recusant witness except in the cases in which the constitution gives the Senate judicial power.

If Congress has power to compel the production of evidence, to aid Congress in formulating further legislation, then Congress, both Houses concurring, must declare its purpose, and the demand for the information. The Senate cannot legislate, and the Senate cannot compel testimony relating to proposed legislation which the Senate alone has in mind. Const., Art. I, § 1; See *State v. Guilbert*, 75 O. S. 1.

If a witness may be compelled to testify in order to aid the Senate in the formulation of legislation, then it must be shown what legislation the Senate has in view

and that the evidence sought is pertinent to the subject-matter of legislation under consideration, and the testimony of the witness can be compelled only through judicial process of the court. In order to justify the compulsory discovery of evidence it must appear for what purpose the testimony is sought and the materiality of the evidence must be affirmatively shown. *Federal Trade Comm. v. American Tobacco Co.*, 264 U. S. 298; *Hale v. Henkel*, 201 U. S. 43. *Matter of Barnes*, 204 N. Y. 108; *United States v. Searles*, 25 Wash. L. Rep. 384.

Senate Resolution No. 157 not only does not show what subjects of legislation were in contemplation, but does show the purpose of the investigation, namely, to determine as to the alleged guilt of Harry M. Daugherty. There is nothing in the record to show what proposed subject-matters of legislation were under consideration, and in no way can it be seen that the testimony of the appellee or the books and records of the bank and the accounts of the bank's customer could furnish information that would be useful in framing any legislation shown to have been in the mind of the Senate or of any member thereof.

The warrant issued by the president *pro tempore* of the Senate was not supported by oath or affirmation as required by the Federal Constitution. Even a bench warrant must be supported by oath. No arrest or attachment for contempt can issue from any court where the contempt is constructive or outside of the presence of the court without a supporting affidavit.

The arrest of Mr. Daugherty is illegal for the reason that it was made under a warrant to bring him forcibly before the Senate to answer the Senate's questions before he had been subpoenaed by the Senate and had refused to obey the Senate.

This Court will respect the jurisdiction and order of the state court, and will make no order which may

effectuate a violation of the injunction or conflict with the purpose and spirit of the injunction.

The law does not provide for any deputy Sergeant-at-Arms. If there were such an officer, this warrant could not be executed by him because it is directed to the Sergeant-at-Arms and not to a deputy.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is an appeal from the final order in a proceeding in *habeas corpus* discharging a recusant witness held in custody under process of attachment issued from the United States Senate in the course of an investigation which it was making of the administration of the Department of Justice. A full statement of the case is necessary.

The Department of Justice is one of the great executive departments established by congressional enactment and has charge, among other things, of the initiation and prosecution of all suits, civil and criminal, which may be brought in the right and name of the United States to compel obedience or punish disobedience to its laws, to recover property obtained from it by unlawful or fraudulent means, or to safeguard its rights in other respects; and also of the assertion and protection of its interests when it or its officers are sued by others. The Attorney General is the head of the department, and its functions are all to be exercised under his supervision and direction.¹

Harry M. Daugherty became the Attorney General March 5, 1921, and held that office until March 28, 1924,

¹ Rev. Stats. secs. 346, 350, 359, 360, 361, 362, 367; Judicial Code, secs. 185, 212; c. 382, secs. 3, 5, 25 Stat. 858, 859; c. 647, sec. 4, 26 Stat. 209; c. 3935, 34 Stat. 816; c. 323, sec. 15, 38 Stat. 736; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 278; *Kern River Co. v. United States*, 257 U. S. 147, 155; *Ponzi v. Fessenden*, 258 U. S. 254, 262.

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when he resigned. Late in that period various charges of misfeasance and nonfeasance in the Department of Justice after he became its supervising head were brought to the attention of the Senate by individual senators and made the basis of an insistent demand that the department be investigated to the end that the practices and deficiencies which, according to the charges, were operating to prevent or impair its right administration might be definitely ascertained and that appropriate and effective measures might be taken to remedy or eliminate the evil. The Senate regarded the charges as grave and requiring legislative attention and action. Accordingly it formulated, passed and invited the House of Representatives to pass (and that body did pass) two measures taking important litigation then in immediate contemplation out of the control of the Department of Justice and placing the same in charge of special counsel to be appointed by the President²; and also adopted a resolution authorizing and directing a select committee of five senators—

“to investigate circumstances and facts, and report the same to the Senate, concerning the alleged failure of Harry M. Daugherty, Attorney General of the United States, to prosecute properly violators of the Sherman Anti-trust Act and the Clayton Act against monopolies and unlawful restraint of trade; the alleged neglect and failure of the said Harry M. Daugherty, Attorney General of the United States, to arrest and prosecute Albert B. Fall, Harry F. Sinclair, E. L. Doheny, C. R. Forbes, and their co-conspirators in defrauding the Government, as well as the alleged neglect and failure of the said Attorney General to arrest and prosecute many others for violations of Federal statutes, and his alleged failure

² Cong. Rec. 68th Cong., 1st Sess., pp. 1520, 1521, 1728; c. 16, 43 Stat. 5; Cong. Rec. 68th Cong., 1st Sess., pp. 1591, 1974; c. 39, 43 Stat. 15; c. 42, 43 Stat. 16.

to prosecute properly, efficiently, and promptly, and to defend, all manner of civil and criminal actions wherein the Government of the United States is interested as a party plaintiff or defendant. And said committee is further directed to inquire into, investigate and report to the Senate the activities of the said Harry M. Daugherty, Attorney General, and any of his assistants in the Department of Justice which would in any manner tend to impair their efficiency or influence as representatives of the Government of the United States."

The resolution also authorized the committee to send for books and papers, to subpoena witnesses, to administer oaths, and to sit at such times and places as it might deem advisable.³

In the course of the investigation the committee issued and caused to be duly served on Mally S. Daugherty—who was a brother of Harry M. Daugherty and president of the Midland National Bank of Washington Court House, Ohio,—a subpoena commanding him to appear before the committee for the purpose of giving testimony bearing on the subject under investigation, and to bring with him the "deposit ledgers of the Midland National Bank since November 1, 1920; also note files and transcript of owners of every safety vault; also records of income drafts; also records of any individual account or accounts showing withdrawals of amounts of \$25,000 or over during above period." The witness failed to appear.

A little later in the course of the investigation the committee issued and caused to be duly served on the same witness another subpoena commanding him to appear before it for the purpose of giving testimony relating to the subject under consideration—nothing being

³ For the full resolution and two amendments adopted shortly thereafter see Cong. Rec., 68th Cong., 1st Sess., pp. 3299, 3409-3410, 3548, 4126.

said in this subpoena about bringing records, books or papers. The witness again failed to appear; and no excuse was offered by him for either failure.

The committee then made a report to the Senate stating that the subpoenas had been issued, that according to the officer's returns—copies of which accompanied the report—the witness was personally served; and that he had failed and refused to appear.⁴ After a reading of the report, the Senate adopted a resolution reciting these facts and proceeding as follows:⁵

"Whereas the appearance and testimony of the said M. S. Daugherty is material and necessary in order that the committee may properly execute the functions imposed upon it and may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper: Therefore be it

"Resolved, That the President of the Senate pro tempore issue his warrant commanding the Sergeant at Arms or his deputy to take into custody the body of the said M. S. Daugherty wherever found, and to bring the said M. S. Daugherty before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry as the Senate may order the President of the Senate pro tempore to propound; and to keep the said M. S. Daugherty in custody to await the further order of the Senate."

It will be observed from the terms of the resolution that the warrant was to be issued in furtherance of the effort to obtain the personal testimony of the witness and, like the second subpoena, was not intended to exact from him the production of the various records, books and papers named in the first subpoena.

The warrant was issued agreeably to the resolution and was addressed simply to the Sergeant at Arms. That

⁴ Senate Report No. 475, 68th Cong., 1st Sess.

⁵ Cong. Rec., 68th Cong., 1st Sess., pp. 7215-7217.

officer on receiving the warrant endorsed thereon a direction that it be executed by John J. McGrain, already his deputy, and delivered it to him for execution.

The deputy, proceeding under the warrant, took the witness into custody at Cincinnati, Ohio, with the purpose of bringing him before the bar of the Senate as commanded; whereupon the witness petitioned the federal district court in Cincinnati for a writ of *habeas corpus*. The writ was granted and the deputy made due return setting forth the warrant and the cause of the detention. After a hearing the court held the attachment and detention unlawful and discharged the witness, the decision being put on the ground that the Senate in directing the investigation and in ordering the attachment exceeded its powers under the Constitution, 299 Fed. 620. The deputy prayed and was allowed a direct appeal to this Court under § 238 of the Judicial Code as then existing.

We have given the case earnest and prolonged consideration because the principal questions involved are of unusual importance and delicacy. They are (a) whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it, or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution, and (b) whether it sufficiently appears that the process was being employed in this instance to obtain testimony for that purpose.

Other questions are presented which in regular course should be taken up first.

The witness challenges the authority of the deputy to execute the warrant on two grounds—that there was no provision of law for a deputy, and that, even if there were such a provision, a deputy could not execute the

warrant because it was addressed simply to the Sergeant at Arms. We are of opinion that neither ground is tenable.

The Senate adopted in 1889 and has retained ever since a standing order declaring that the Sergeant at Arms may appoint deputies "to serve process or perform other duties" in his stead, that they shall be "officers of the Senate," and that acts done and returns made by them "shall have like effect and be of the same validity as if performed or made by the Sergeant at Arms in person."⁶ In actual practice the Senate has given full effect to the order; and Congress has sanctioned the practice under it by recognizing the deputies—sometimes called assistants—as officers of the Senate, by fixing their compensation and by making appropriations to pay them.⁷ Thus there was ample provision of law for a deputy.

The fact that the warrant was addressed simply to the Sergeant at Arms is not of special significance. His authority was not to be tested by the warrant alone. Other criteria were to be considered. The standing order and the resolution under which the warrant was issued plainly contemplated that he was to be free to execute the warrant in person or to direct a deputy to execute it. They expressed the intention of the Senate; and the words of the warrant were to be taken, as they well could be, in a sense which would give effect to that intention. Thus understood, the warrant admissibly could be executed by a deputy if the Sergeant at Arms so directed, which he did.

The case of *Sanborn v. Carleton*, 15 Gray 399, on which the witness relies, related to a warrant issued to the Sergeant at Arms in 1860, which he deputed another to execute. At that time there was no standing rule or

⁶ Senate Journal 47, 51-1, Dec. 17, 1889; Senate Rules and Manual, 68th Cong., p. 114.

⁷ 41 Stat. 632, 1253; 42 Stat. 424, 1266; 43 Stat. 33, 580, 1288.

statute permitting him to act through a deputy; nor was there anything in the resolution under which the warrant was issued indicative of a purpose to permit him to do so. All that was decided was that in the absence of a permissive provision, in the warrant or elsewhere, he could not commit its execution to another. The provision which was absent in that case and deemed essential is present in this.

The witness points to the provision in the Fourth Amendment to the Constitution declaring "no warrants shall issue but upon probable cause supported by oath or affirmation" and contends that the warrant was void because the report of the committee on which it was based was unsworn. We think the contention overlooks the relation of the committee to the Senate and to the matters reported, and puts aside the accepted interpretation of the constitutional provision.

The committee was a part of the Senate, and its members were acting under their oath of office as senators. The matters reported pertained to their proceedings and were within their own knowledge. They had issued the subpoenas, had received and examined the officer's returns thereon (copies of which accompanied the report), and knew the witness had not obeyed either subpoena or offered any excuse for his failure to do so.

The constitutional provision was not intended to establish a new principle but to affirm and preserve a cherished rule of the common law designed to prevent the issue of groundless warrants. In legislative practice committee reports are regarded as made under the sanction of the oath of office of its members; and where the matters reported are within the committee's knowledge and constitute probable cause for an attachment such reports are acted on and given effect without requiring that they be supported by further oath or affirmation. This is

not a new practice but one which has come down from an early period. It was well recognized before the constitutional provision was adopted, has been followed ever since, and appears never to have been challenged until now. Thus it amounts to a practical interpretation, long continued, of both the original common law rule and the affirming constitutional provision, and should be given effect accordingly.⁸

The principle underlying the legislative practice has also been recognized and applied in judicial proceedings. This is illustrated by the settled rulings that courts in dealing with contempts committed in their presence may order commitments without other proof than their own knowledge of the occurrence,⁹ and that they may issue attachments, based on their own knowledge of the default, where intended witnesses or jurors fail to appear in obedience to process shown by the officer's return to have been duly served.¹⁰ A further illustration is found in the rulings that grand jurors, acting under the sanction of their oaths as such, may find and return indictments based solely on their own knowledge of the particular offenses, and that warrants may be issued on such indictments without further oath or affirmation;¹¹ and still another is found in the practice which recognizes that where grand jurors, under their oath as such, report to the court that a witness brought before them has refused to testify, the

⁸ *Prigg v. Pennsylvania*, 16 Pet. 539, 620-621; *The Laura*, 114 U. S. 411, 416; *McPherson v. Blacker*, 146 U. S. 1, 35-36; *Ex parte Grossman*, 267 U. S. 87, 118; *Myers v. United States*, 272 U. S. 52.

⁹ *Ex parte Terry*, 128 U. S. 289, 307, *et seq.*; *Holcomb v. Cornish*, 8 Conn. 375; 4 Blackst. Com. 286.

¹⁰ *Robbins v. Gorham*, 25 N. Y. 588; *Wilson v. State*, 57 Ind. 71.

¹¹ *Hale v. Henkel*, 201 U. S. 43, 60-62; *Regina v. Russell*, 2 Car. & Mar. 247; *Commonwealth v. Hayden*, 163 Mass. 453, 455; Decision of Mr. Justice Catron reported in Wharton's Cr. Pl. & Pr., 8th ed., pp. 224-226.

court may act on that report, although otherwise unsworn, and order the witness brought before it by attachment.¹²

We think the legislative practice, fortified as it is by the judicial practice, shows that the report of the committee—which was based on the committee's own knowledge and made under the sanction of the oath of office of its members—was sufficiently supported by oath to satisfy the constitutional requirement.

The witness also points to the provision in the warrant and in the resolution under which it was issued requiring that he be "brought before the bar of the Senate, then and there" to give testimony "pertinent to the subject under inquiry," and contends that an essential prerequisite to such an attachment was wanting, because he neither had been subpoenaed to appear and testify before the Senate nor had refused to do so. The argument in support of the contention proceeds on the assumption that the warrant of attachment "is to be treated precisely the same as if no subpoena had been issued by the committee, and the same as if the witness had not refused to testify before the committee." In our opinion the contention and the assumption are both untenable. The committee was acting for the Senate and under its authorization; and therefore the subpoenas which the committee issued and the witness refused to obey are to be treated as if issued by the Senate. The warrant was issued as an auxiliary process to compel him to give the testimony sought by the subpoenas; and its nature in this respect is not affected by the direction that his testimony be given at the bar of the Senate instead of before the committee. If the Senate deemed it proper, in view of his contumacy, to give that direction it was at liberty to do so.

¹² See *Hale v. Henkel*, *supra*; *Blair v. United States*, 250 U. S. 273; *Nelson v. United States*, 201 U. S. 92, 95; *Equity Rule 52*, 226 U. S. Appendix, 15; *Heard v. Pierce*, 8 Cush. 338.

The witness sets up an interlocutory injunction granted by a state court at Washington Court House, Ohio, in a suit brought by the Midland National Bank against two members of the investigating committee, and contends that the attachment was in violation of that injunction and therefore unlawful. The contention is plainly ill-founded. The injunction was granted the same day the second subpoena was served, but whether earlier or later in the day does not appear. All that the record discloses about the injunction is comprised in the paragraph copied in the margin from the witness's petition for *habeas corpus*.¹⁸ But it is apparent from what is disclosed that the injunction did not purport to place any restraint on the witness, nor to restrain the committee from demanding that he appear and testify personally to what he knew respecting the subject under investigation; and also that what the injunction did purport to restrain has no bearing on the power of the Senate to enforce that demand by attachment.

¹⁸ "On the 11th day of April, 1924, in an action in the Court of Common Pleas of said Fayette County, Ohio, in which said The Midland National Bank was plaintiff and said B. K. Wheeler and Smith W. Brookhart were defendants, upon the petition of said bank said court granted a temporary restraining order enjoining and restraining said defendants and their agents, servants, and employees from entering into said banking room and from taking, examining, or investigating any of the books, accounts, records, promissory notes, securities, letters, correspondence, papers, or any other property of said bank or of its depositors, borrowers, or customers in said banking room and from in any manner molesting and interfering with the business and affairs of said bank, its officers, agents, servants, and the business of its depositors, borrowers and customers with said bank until the further order of said court. The said defendants were duly served with process in said action and duly served with copies of said temporary restraining order on said 11th day of April, 1924, and said injunction has not been modified by said court and no further order has been made in said case by said court, and said injunction is in full force and effect."

In approaching the principal questions, which remain to be considered, two observations are in order. One is that we are not now concerned with the direction in the first subpoena that the witness produce various records, books and papers of the Midland National Bank. That direction was not repeated in the second subpoena; and is not sought to be enforced by the attachment. This was recognized by the court below, 299 Fed. 623, and is conceded by counsel for the appellant. The other is that we are not now concerned with the right of the Senate to propound or the duty of the witness to answer specific questions, for as yet no questions have been propounded to him. He is asserting—and is standing on his assertion—that the Senate is without power to interrogate him, even if the questions propounded be pertinent and otherwise legitimate—which for present purposes must be assumed.

The first of the principal questions—the one which the witness particularly presses on our attention—is, as before shown, whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.

The Constitution provides for a Congress consisting of a Senate and House of Representatives and invests it with “all legislative powers” granted to the United States, and with power “to make all laws which shall be necessary and proper” for carrying into execution these powers and “all other powers” vested by the Constitution in the United States or in any department or officer thereof. Art. I, secs 1, 8. Other provisions show that, while bills can become laws only after being considered and passed by both houses of Congress, each house is to be distinct

from the other, to have its own officers and rules, and to exercise its legislative function 'independently.'¹⁴ Art. I, secs. 2, 3, 5, 7. But there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether this power is so far incidental to the legislative function as to be implied.

In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures.¹⁵

This power was both asserted and exerted by the House of Representatives in 1792, when it appointed a select committee to inquire into the St. Clair expedition and authorized the committee to send for necessary persons, papers and records. Mr. Madison, who had taken an important part in framing the Constitution only five years before, and four of his associates in that work, were members of the House of Representatives at the time, and all voted for the inquiry. 3 Cong. Ann. 494. Other exertions of the power by the House of Representatives, as also by the Senate, are shown in the citations already made. Among those by the Senate, the inquiry ordered in 1859 respecting the raid by John Brown and his adherents on the armory and arsenal of the United States at Harper's Ferry is of special significance. The resolution

¹⁴ Story Const., secs. 545, *et seq.*; 1 Kent's Com., p. 222.

¹⁵ May's Parliamentary Practice, 2d ed., pp. 80, 295, 299; Cushing's Legislative Practice, secs. 634, 1901-1903; 3 Hinds' Precedents, secs. 1722, 1725, 1727, 1813-1820; Cooley's Constitutional Limitations, 6th ed., p. 161.

directing the inquiry authorized the committee to send for persons and papers, to inquire into the facts pertaining to the raid and the means by which it was organized and supported, and to report what legislation, if any, was necessary to preserve the peace of the country and protect the public property. The resolution was briefly discussed and adopted without opposition. Cong. Globe, 36th Cong., 1st Sess., pp. 141, 152. Later on the committee reported that Thaddeus Hyatt, although subpoenaed to appear as a witness, had refused to do so; whereupon the Senate ordered that he be attached and brought before it to answer for his refusal. When he was brought in he answered by challenging the power of the Senate to direct the inquiry and exact testimony to aid it in exercising its legislative function. The question of power thus presented was thoroughly discussed by several senators—Mr. Sumner of Massachusetts taking the lead in denying the power and Mr. Fessenden of Maine in supporting it. Sectional and party lines were put aside and the question was debated and determined with special regard to principle and precedent. The vote was taken on a resolution pronouncing the witness's answer insufficient and directing that he be committed until he should signify that he was ready and willing to testify. The resolution was adopted—44 senators voting for it and 10 against. Cong. Globe, 36th Cong., 1st Sess., pp. 1100–1109, 3006–3007. The arguments advanced in support of the power are fairly reflected by the following excerpts from the debate:

Mr. Fessenden of Maine. "Where will you stop? Stop, I say, just at that point where we have gone far enough to accomplish the purposes for which we were created; and these purposes are defined in the Constitution. What are they? The great purpose is legislation. There are some other things, but I speak of legislation as the principal purpose. Now, what do we propose to do here? We

propose to legislate upon a given state of facts, perhaps, or under a given necessity. Well, sir, proposing to legislate, we want information. We have it not ourselves. It is not to be presumed that we know everything; and if any body does presume it, it is a very great mistake, as we know by experience. We want information on certain subjects. How are we to get it? The Senator says, ask for it. I am ready to ask for it; but suppose the person whom we ask will not give it to us: what then? Have we not power to compel him to come before us? Is this power, which has been exercised by Parliament, and by all legislative bodies down to the present day without dispute—the power to inquire into subjects upon which they are disposed to legislate—lost to us? Are we not in the possession of it? Are we deprived of it simply because we hold our power here under a Constitution which defines what our duties are, and what we are called upon to do?

“Congress have appointed committees after committees, time after time, to make inquiries on subjects of legislation. Had we not power to do it? Nobody questioned our authority to do it. We have given them authority to send for persons and papers during the recess. Nobody questioned our authority. We appoint committees during the session, with power to send for persons and papers. Have we not that authority, if necessary to legislation?

* * * * *

“Sir, with regard to myself, all I have to inquire into is: is this a legitimate and proper object, committed to me under the Constitution; and then, as to the mode of accomplishing it, I am ready to use judiciously, calmly, moderately, all the power which I believe is necessary and inherent, in order to do that which I am appointed to do; and, I take it, I violate no rights, either of the people generally or of the individual, by that course.”

Mr. Crittenden of Kentucky. "I come now to a question where the coöperation of the two branches is not necessary. There are some things that the Senate may do. How? According to a mode of its own. Are we to ask the other branch of the Legislature to concede by law to us the power of making such an inquiry as we are now making? Has not each branch the right to make what inquiries and investigation it thinks proper to make for its own action? Undoubtedly. You say we must have a law for it. Can we have a law? Is it not, from the very nature of the case, incidental to you as a Senate, if you, as a Senate, have the power of instituting an inquiry and of proceeding with that inquiry? I have endeavored to show that we have that power. We have a right, in consequence of it, a necessary incidental power, to summon witnesses, if witnesses are necessary. Do we require the concurrence of the other House to that? It is a power of our own. If you have a right to do the thing of your own motion, you must have all powers that are necessary to do it.

"The means of carrying into effect by law all the granted powers, is given where legislation is applicable and necessary; but there are subordinate matters, not amounting to laws; there are inquiries of the one House or the other House, which each House has a right to conduct; which each has, from the beginning, exercised the power to conduct; and each has, from the beginning, summoned witnesses. This has been the practice of the Government from the beginning; and if we have a right to summon the witness, all the rest follows as a matter of course."

The deliberate solution of the question on that occasion has been accepted and followed on other occasions by both houses of Congress, and never has been rejected or questioned by either.

The state courts quite generally have held that the power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for the purpose.

In *Burnham v. Morrisey*, 14 Gray 226, 239, the Supreme Judicial Court of Massachusetts, in sustaining an exertion of this power by one branch of the legislature of that Commonwealth, said:

"The house of representatives has many duties to perform, which necessarily require it to receive evidence and examine witnesses. . . . It has often occasion to acquire certain knowledge of facts, in order to the proper performance of legislative duties. We therefore think it clear that it has the constitutional right to take evidence, to summon witnesses, and to compel them to appear and testify. This power to summon and examine witnesses it may exercise by means of committees."

In *Wilckens v. Willet*, 1 Keyes 521, 525, a case which presented the question whether the House of Representatives of the United States possesses this power, the Court of Appeals of New York said:

"That the power exists there admits of no doubt whatever. It is a necessary incident to the sovereign power of making laws; and its exercise is often indispensable to the great end of enlightened, judicious and wholesome legislation."

In *People v. Keeler*, 99 N. Y. 463, 482, 483, where the validity of a statute of New York recognizing and giving effect to this power was drawn in question, the Court of Appeals approvingly quoted what it had said in *Wilckens v. Willet*, and added:

"It is difficult to conceive any constitutional objection which can be raised to the provision authorizing legislative committees to take testimony and to summon

witnesses. In many cases it may be indispensable to intelligent and effectual legislation to ascertain the facts which are claimed to give rise to the necessity for such legislation, and the remedy required, and, irrespective of the question whether in the absence of a statute to that effect either house would have the power to imprison a recusant witness, I cannot yield to the claim that a statute authorizing it to enforce its process in that manner is in excess of the legislative power. To await the slow process of indictment and prosecution for a misdemeanor, might prove quite ineffectual, and necessary legislation might be obstructed, and perhaps defeated, if the legislative body had no other and more summary means of enforcing its right to obtain the required information. That the power may be abused, is no ground for denying its existence. It is a limited power, and should be kept within its proper bounds; and, when these are exceeded, a jurisdictional question is presented which is cognizable in the courts."

. . . "Throughout this Union the practice of legislative bodies, and in this State, the statutes existing at the time the present Constitution was adopted, and whose validity has never before been questioned by our courts, afford strong arguments in favor of the recognition of the right of either house to compel the attendance of witnesses for legislative purposes, as one which has been generally conceded to be an appropriate adjunct to the power of legislation, and one which, to say the least, the State legislature has constitutional authority to regulate and enforce by statute."

Other decisions by state courts recognizing and sustaining the legislative practice are found in *Falvey v. Massing*, 7 Wis. 630, 635-638; *State v. Frear*, 138 Wis. 173; *Ex parte Parker*, 74 S. C. 466, 470; *Sullivan v. Hill*, 73 W. Va. 49, 53; *Lowe v. Summers*, 69 Mo. App. 637, 649-650. An instructive decision on the question is also found in *Ex parte Dansereau* (1875), 19 L. C. Jur. 210, where the

legislative assembly of the Province of Quebec was held to possess this power as a necessary incident of its power to legislate.

We have referred to the practice of the two houses of Congress; and we now shall notice some significant congressional enactments. May 3, 1798, c. 36, 1 Stat. 554, Congress provided that oaths or affirmations might be administered to witnesses by the President of the Senate, the Speaker of the House of Representatives, the chairman of a committee of the whole, or the chairman of a select committee, "in any case under their examination." February 8, 1817, c. 10, 3 Stat. 345, it enlarged that provision so as to include the chairman of a standing committee. January 24, 1857, c. 19, 11 Stat. 155, it passed "An Act more effectually to enforce the attendance of witnesses on the summons of either house of Congress, and to compel them to discover testimony." This act provided, first, that any person summoned as a witness to give testimony or produce papers in any matter under inquiry before either house of Congress, or any committee of either house, who should wilfully make default, or, if appearing, should refuse to answer any question pertinent to the inquiry, should, in addition to the pains and penalties then existing,¹⁶ be deemed guilty of a misdemeanor and be subject to indictment and punishment as there prescribed; and secondly, that no person should be excused from giving evidence in such an inquiry on the ground that it might tend to incriminate or disgrace him, nor be held to answer criminally, or be subjected to any penalty or forfeiture, for any fact or act as to which he was required to testify, excepting that he might be subjected to prosecution for perjury committed while so testifying. January 24, 1862, c. 11, 12 Stat. 333, Congress modified the immunity provision in particulars not mate-

¹⁶ The reference is to the power of the particular house to deal with the contempt. *In re Chapman*, 166 U. S. 661, 671-672.

rial here. These enactments are now embodied in §§ 101-104 and 859 of Revised Statutes. They show very plainly that Congress intended thereby (a) to recognize the power of either house to institute inquiries and exact evidence touching subjects within its jurisdiction and on which it was disposed to act;¹⁷ (b) to recognize that such inquiries may be conducted through committees; (c) to subject defaulting and contumacious witnesses to indictment and punishment in the courts, and thereby to enable either house to exert the power of inquiry "more effectually";¹⁸ and (d) to open the way for obtaining evidence in such an inquiry, which otherwise could not be obtained, by exempting witnesses required to give evidence therein from criminal and penal prosecutions in respect of matters disclosed by their evidence.

Four decisions of this Court are cited and more or less relied on, and we now turn to them.

The first decision was in *Anderson v. Dunn*, 6 Wheat. 204. The question there was whether, under the Constitution, the House of Representatives has power to attach and punish a person other than a member for con-

¹⁷ In construing section 1 of the Act of 1857 as reproduced in section 102 of the Revised Statutes, this Court said in *In re Chapman*, 166 U. S. 661, 667:

"It is true that the reference is to 'any' matter under inquiry, and so on, and it is suggested that this is fatally defective because too broad and unlimited in its extent; but nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion, *Lau Ow Bew v. United States*, 144 U. S. 47, 59; and we think that the word 'any,' as used in these sections, refers to matters within the jurisdiction of the two Houses of Congress, before them for consideration and proper for their action; to questions pertinent thereto; and to facts or papers bearing thereon."

¹⁸ This Court has said of the act of 1857 that "it was necessary and proper for carrying into execution the powers vested in Congress and in each house thereof," *In re Chapman*, 166 U. S. 661, 671.

tempt of its authority—in fact, an attempt to bribe one of its members. The Court regarded the power as essential to the effective exertion of other powers expressly granted, and therefore as implied. The argument advanced to the contrary was that as the Constitution expressly grants to each house power to punish or expel its own members and says nothing about punishing others, the implication or inference, if any, is that power to punish one who is not a member is neither given nor intended. The Court answered this by saying:

(p. 225) “There is not in the whole of that admirable instrument, a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.”

(p. 233) “This argument proves too much; for its direct application would lead to annihilation of almost every power of Congress. To enforce its laws upon any subject without the sanction of punishment is obviously impossible. Yet there is an express grant of power to punish in one class of cases and one only, and all the punishing power exercised by Congress in any cases, except those which relate to piracy and offenses against the laws of nations, is derived from implication. Nor did the idea ever occur to any one, that the express grant in one class of cases repelled the assumption of the punishing power in any other. The truth is, that the exercise of the powers given over their own members, was of such a delicate nature, that a constitutional provision became necessary to assert or communicate it. Constituted, as that body is, of the delegates of confederated States, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honour or interests of the state which sent him.”

The next decision was in *Kilbourn v. Thompson*, 103 U. S. 168. The question there was whether the House of Representatives had exceeded its power in directing one of its committees to make a particular investigation. The decision was that it had. The principles announced and applied in the case are—that neither house of Congress possesses a “general power of making inquiry into the private affairs of the citizen”; that the power actually possessed is limited to inquiries relating to matters of which the particular house “has jurisdiction” and in respect of which it rightfully may take other action; that if the inquiry relates to “a matter wherein relief or redress could be had only by a judicial proceeding” it is not within the range of this power, but must be left to the courts, conformably to the constitutional separation of governmental powers; and that for the purpose of determining the essential character of the inquiry recourse may be had to the resolution or order under which it is made. The court examined the resolution which was the basis of the particular inquiry, and ascertained therefrom that the inquiry related to a private real-estate pool or partnership in the District of Columbia. Jay Cooke & Co. had had an interest in the pool, but had become bankrupts, and their estate was in course of administration in a federal bankruptcy court in Pennsylvania. The United States was one of their creditors. The trustee in the bankruptcy proceeding had effected a settlement of the bankrupts’ interest in the pool, and of course his action was subject to examination and approval or disapproval by the bankruptcy court. Some of the creditors, including the United States, were dissatisfied with the settlement. In these circumstances, disclosed in the preamble, the resolution directed the committee “to inquire into the matter and history of said real-estate pool and the character of said settlement, with the amount of property involved in which Jay Cooke & Co.

were interested, and the amount paid or to be paid in said settlement, with power to send for persons and papers and report to the House." The Court pointed out that the resolution contained no suggestion of contemplated legislation; that the matter was one in respect to which no valid legislation could be had; that the bankrupts' estate and the trustee's settlement were still pending in the bankruptcy court; and that the United States and other creditors were free to press their claims in that proceeding. And on these grounds the Court held that in undertaking the investigation "the House of Representatives not only exceeded the limit of its own authority, but assumed power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial."

The case has been cited at times, and is cited to us now, as strongly intimating, if not holding, that neither house of Congress has power to make inquiries and exact evidence in aid of contemplated legislation. There are expressions in the opinion which, separately considered, might bear such an interpretation; but that this was not intended is shown by the immediately succeeding statement (p. 189) that "This latter proposition is one which we do not propose to decide in the present case because we are able to decide the case without passing upon the existence or non-existence of such a power in aid of the legislative function."

Next in order is *In re Chapman*, 166 U. S. 661. The inquiry there in question was conducted under a resolution of the Senate and related to charges, published in the press, that senators were yielding to corrupt influences in considering a tariff bill then before the Senate and were speculating in stocks the value of which would be affected by pending amendments to the bill. Chapman appeared before the committee in response to a subpoena, but refused to answer questions pertinent to the inquiry, and

was indicted and convicted under the act of 1857 for his refusal. The Court sustained the constitutional validity of the act of 1857, and, after referring to the constitutional provision empowering either house to punish its members for disorderly behavior and by a vote of two-thirds to expel a member, held that the inquiry related to the integrity and fidelity of senators in the discharge of their duties, and therefore to a matter "within the range of the constitutional powers of the Senate" and in respect of which it could compel witnesses to appear and testify. In overruling an objection that the inquiry was without any defined or admissible purpose, in that the preamble and resolution made no reference to any contemplated expulsion, censure, or other action by the Senate, the Court held that they adequately disclosed a subject-matter of which the Senate had jurisdiction, that it was not essential that the Senate declare in advance what it meditated doing, and that the assumption could not be indulged that the Senate was making the inquiry without a legitimate object.

The case is relied on here as fully sustaining the power of either house to conduct investigations and exact testimony from witnesses for legislative purposes. In the course of the opinion (p. 671) it is said that disclosures by witnesses may be compelled constitutionally "to enable the respective bodies to discharge their legitimate functions, and that it was to effect this that the act of 1857 was passed"; and also "We grant that Congress could not divest itself, or either of its houses, of the essential and inherent power to punish for contempt, in cases to which the power of either house properly extended; but, because Congress, by the act of 1857, sought to aid each of the houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved." The terms "legitimate functions" and "constitutional functions"

are broad and might well be regarded as including the legislative function, but as the case in hand did not call for any expression respecting that function, it hardly can be said that these terms were purposely used as including it.

The latest case is *Marshall v. Gordon*, 243 U. S. 521. The question there was whether the House of Representatives exceeded its power in punishing, as for a contempt of its authority, a person—not a member—who had written, published and sent to the chairman of one of its committees an ill-tempered and irritating letter respecting the action and purposes of the committee. Power to make inquiries and obtain evidence by compulsory process was not involved. The Court recognized distinctly that the House of Representatives has implied power to punish a person not a member for contempt, as was ruled in *Anderson v. Dunn*, *supra*, but held that its action in this instance was without constitutional justification. The decision was put on the ground that the letter, while offensive and vexatious, was not calculated or likely to affect the House in any of its proceedings or in the exercise of any of its functions—in short, that the act which was punished as a contempt was not of such a character as to bring it within the rule that an express power draws after it others which are necessary and appropriate to give effect to it.

While these cases are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: One, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and, the other, that neither house is invested with “general” power to inquire into private affairs and compel disclo-

tures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied. The latter proposition has further support in *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 417-419, and *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298, 305-306.

With this review of the legislative practice, congressional enactments and court decisions, we proceed to a statement of our conclusions on the question.

We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action—and both houses have employed the power accordingly up to the present time. The acts of 1798 and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both houses and to enable them to employ it “more effectually” than before. So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.¹⁰

¹⁰ *Stuart v. Laird*, 1 Cranch 299, 309; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 351; *Ames v. Kansas*, 111 U. S. 449, 469; *Knowlton v. Moore*, 178 U. S. 41, 56, 92; *Fairbank v. United States*, 181 U. S. 283, 306; *et seq.*

We are further of opinion that the provisions are not of doubtful meaning, but, as was held by this Court in the cases we have reviewed, are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end. While the power to exact information in aid of the legislative function was not involved in those cases, the rule of interpretation applied there is applicable here. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or with-

out due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson* and *Marshall v. Gordon* point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn v. Thompson* and *In re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

We come now to the question whether it sufficiently appears that the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function. The court below answered the question in the negative and put its decision largely on this ground, as is shown by the following excerpts from its opinion (299 Fed. 638, 639, 640):

"It will be noted that in the second resolution the Senate has expressly avowed that the investigation is in aid of other action than legislation. Its purpose is to 'obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.' This indicates that the Senate is contemplating the taking of action other than legislative, as the outcome of the investigation, at least the possibility of so doing. The extreme personal cast of the original resolutions; the spirit of hostility towards the then Attorney General which they breathe; that it was not avowed that legislative action was had in view until after the action of the Senate had been challenged; and that the avowal then was coupled with an avowal that other action was had in view—are calculated to create the impression that the idea of legislative action being in contemplation was an afterthought.

"That the Senate has in contemplation the possibility of taking action other than legislation as an outcome of the investigation, as thus expressly avowed, would seem

of itself to invalidate the entire proceeding. But, whether so or not, the Senate's action is invalid and absolutely void, in that, in ordering and conducting the investigation, it is exercising the judicial function, and power to exercise that function, in such a case as we have here, has not been conferred upon it expressly or by fair implication. What it is proposing to do is to determine the guilt of the Attorney General of the shortcomings and wrongdoings set forth in the resolutions. It is 'to hear, adjudge, and condemn.' In so doing it is exercising the judicial function.

"What the Senate is engaged in doing is not investigating the Attorney General's office; it is investigating the former Attorney General. What it has done is to put him on trial before it. In so doing it is exercising the judicial function. This it has no power to do."

We are of opinion that the court's ruling on this question was wrong, and that it sufficiently appears, when the proceedings are rightly interpreted, that the object of the investigation and of the effort to secure the witness's testimony was to obtain information for legislative purposes.

It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.

This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. In the *Chapman* case, where the resolution contained no avowal, this Court pointed out that it plainly related to a subject-matter of which the Senate had jurisdiction, and said "We cannot assume on this record that the action of the Senate was without a legitimate object"; and also that "it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded." (166 U. S. 669-670.) In *People v. Keeler*, 99 N. Y. 463, where the Court of Appeals of New York sustained an investigation ordered by the Senate of that state where the resolution contained no avowal, but disclosed that it definitely related to the administration of a public office the duties of which were subject to legislative regulation, the court said (pp. 485, 487): "Where public institutions under the control of the State are ordered to be investigated it is generally with the view of some legislative action respecting them, and the same may be said in respect of public officers." And again: "We are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed, and we have no right to assume that the contrary was intended."

While we rest our conclusion respecting the object of the investigation on the grounds just stated, it is well to observe that this view of what was intended is not new, but was shown in the debate on the resolution.²⁰

Of course, our concern is with the substance of the resolution and not with any nice questions of propriety respecting its direct reference to the then Attorney General by name. The resolution, like the charges which prompted its adoption, related to the activities of the department while he was its supervising officer; and the reference to him by name served to designate the period to which the investigation was directed.

We think the resolution and proceedings give no warrant for thinking the Senate was attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing. Nor do we think

²⁰ Senator George said: "It is not a trial now that is proposed, and there has been no trial proposed save the civil and criminal actions to be instituted and prosecuted by counsel employed under the resolution giving to the President the power to employ counsel. We are not to try the Attorney General. He is not to go upon trial. Shall we say the legislative branch of the Government shall stickle and halt and hesitate because a man's public reputation, his public character, may suffer because of that legislative action? Has not the Senate power to appoint a committee to investigate any department of the Government, any department supported by the Senate in part by appropriations made by the Congress? If the Senate has the right to investigate the department, is the Senate to hesitate, is the Senate to refuse to do its duty merely because the public character or the public reputation of some one who is investigated may be thereby smirched, to use the term that has been used so often in the debate? . . . It is sufficient for me to know that there are grounds upon which I may justly base my vote for the resolution; and I am willing to leave it to the agent created by the Senate to proceed with the investigation fearlessly upon principle, not for the purpose of trying but for the purpose of ascertaining facts which the Senate is entitled to have within its possession in order that it may properly function as a legislative body." Cong. Rec., 68th Cong., 1st Sess., pp. 3397, 3398.

it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part.

The second resolution—the one directing that the witness be attached—declares that his testimony is sought with the purpose of obtaining “information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.” This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of “other action” if deemed “necessary or proper” is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed.

We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment.

Another question has arisen which should be noticed. It is whether the case has become moot. The investigation was ordered and the committee appointed during the Sixty-eighth Congress. That Congress expired March 4, 1925. The resolution ordering the investigation in terms limited the committee's authority to the period of the Sixty-eighth Congress; but this apparently was changed by a later and amendatory resolution authorizing the committee to sit at such times and places as it might

deem advisable or necessary.²¹ It is said in Jefferson's Manual:²² "Neither House can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches. When done, it is by a bill constituting them commissioners for the particular purpose." But the context shows that the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the King. The rule may be the same with the House of Representatives whose members are all elected for the period of a single Congress; but it cannot well be the same with the Senate, which is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.

Mr. Hinds in his collection of precedents says: "The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress";²³ and, after quoting the above statement from Jefferson's Manual, he says: "The Senate, however, being a continuing body, gives authority to its committees during the recess after the expiration of a Congress."²⁴ So far as we are advised the select committee having this investigation in charge has neither made a final report nor been discharged; nor has it been continued by an affirmative order. Apparently its activities have been suspended pending the decision of this case. But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect, and, if continued or revived, will have all its original powers.²⁵

²¹ Cong. Rec., 68th Cong., 1st Sess., p. 4126.

²² Senate Rules and Manual, 1925, p. 303.

²³ Vol. 4, sec. 4544.

²⁴ Vol. 4, sec. 4545.

²⁵ Hinds' Precedents, Vol. 4, secs. 4396, 4400, 4404, 4405.

This being so, and the Senate being a continuing body, the case cannot be said to have become moot in the ordinary sense. The situation is measurably like that in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 514-516, where it was held that a suit to enjoin the enforcement of an order of the Interstate Commerce Commission did not become moot through the expiration of the order where it was capable of repetition by the commission and was a matter of public interest. Our judgment may yet be carried into effect and the investigation proceeded with from the point at which it apparently was interrupted by reason of the *habeas corpus* proceedings. In these circumstances we think a judgment should be rendered as was done in the case cited.

What has been said requires that the final order in the district court discharging the witness from custody be reversed.

Final order reversed.

MR. JUSTICE STONE did not participate in the consideration or decision of the case.

JURNEY V. MACCRACKEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

No. 339. Argued January 7, 8, 1935.—Decided February 4, 1935

1. The power of a House of Congress to punish a private citizen who obstructs the performance of its legislative duties, is not limited to the removal of an existing obstruction but continues after the obstruction has ceased or its removal has become impossible. P. 147.

Held in this case that the Senate had power to cite for contempt a witness charged with having permitted the removal and destruction of papers which he had been subpoenaed to produce.

2. The Act making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor (R. S. § 102) did not impair but supplemented the power of the House affected to punish for such contempt. P. 151.

3. Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offense. P. 151.

4. Where a proceeding for contempt is within the jurisdiction of a House of Congress, the questions whether the person arrested is guilty or has so far purged himself that he does not deserve punishment, are questions for that House to decide and which can not be inquired into by a court by a writ of *habeas corpus*. P. 152.

63 App. D.C. 342; 72 F. (2d) 560, reversed.

Supreme Court, D.C., affirmed.

CERTIORARI, 293 U.S. 543, to review the reversal of a judgment discharging a writ of *habeas corpus* by which the above-named respondent sought to gain his release from the custody of the above-named petitioner, the Sergeant-at-Arms of the Senate.

Mr. Leslie C. Garrett, United States Attorney for the District of Columbia, with whom Mr. H. L. Underwood, Assistant United States Attorney, was on the brief, for petitioner.

There can be no question of the power of the Senate to require the production of the documents subpoenaed in this case. *McGrain v. Daugherty*, 273 U.S. 135. It is undisputed that the respondent did not produce all the papers covered by the subpoena and in his possession or subject to his control at the time the subpoena was served upon him. In clear violation of its mandate, he permitted relevant papers to be taken away, secreted, and destroyed. This was a contempt of the Senate. The fact that respondent put it out of his power to produce the documents does not affect the right of the Senate to punish him for this contempt—indeed, it adds to the contempt—and the fact that some of the papers were thereafter secured by the Senate from other persons does not purge respondent of his contempt.

The power of the Senate to punish does not cease because the act complained of has been committed. This power of the Senate is necessary to enable it to perform its legislative function. To assert that it ceases when the act of contempt is complete is to withdraw the admitted power at the very time when its exercise is necessary. *Marshall v. Gordon*, 243 U.S. 521.

Any facts or arguments presented on behalf of the respondent going to show that he attempted to purge himself of his contempt must be presented to the Senate, which is the tribunal having jurisdiction of this contempt; they have no place in the *habeas corpus* proceedings. *Henry v. Henkel*, 235 U.S. 219, 229; *Marshall v. Gordon*, *supra*; *Anderson v. Dunn*, 6 Wheat. 204; *Kilbourn v. Thompson*, 103 U.S. 168; *Re Chapman*, 166 U.S. 661; *Kielley v. Carson*, 4 Moore P.C. 63.

The power of the Senate to punish summarily for contempt is governed by the same principles as the power of the judiciary to punish for contempt. The test is the character of the act done and its direct tendency to prevent and obstruct the discharge, in the one case of a legislative, and in the other of a judicial, duty and function. *Marshall v. Gordon*, *supra*; *Toledo Newspaper Co. v. United States*, 247 U.S. 402. Since this power is inherent in the courts and in the Senate (and House of Representatives), the Senate may entertain a proceeding to vindicate its authority and to deter other like derelictions. *Ex parte Grossman*, 267 U.S. 87, 111, 117-118. It is not limited to the statutory remedy provided (U. S. C., Title 2, § 194). Both may be availed of. *Re Chapman*, 166 U. S. 661.

The documents taken by Mr. Brittin from the files in the office of respondent were not all presented to the Senate. Such of them as were recovered after being torn up by Brittin were made available by the efforts of investigators of the Post Office Department. See Sen. Doc. No. 162, pp. 106 to 116, 73d Congress, 2d Sess.

The assertion that full compliance with the subpoena has been made ignores the facts. Immunity from contempt of the Senate cannot be claimed because an agency of the Government has frustrated the attempted total destruction of the papers and saved what otherwise would have been lost, a result in no wise due to respondent. He cannot thereby escape the consequences of this additional contempt of the Senate and its process.

The respondent concedes, as he must, that the Senate had the power to require the production of the documents subpoenaed, and that the inquiry which the Senate, through its committee, was conducting was one which it was empowered to make. Also, necessarily conceded is the power of the Senate to punish for the refusal to produce. These things were settled by this Court in *McGrain v. Daugherty*, 273 U. S. 135.

By leave of Court, *Hon. Hatton W. Sumners*, Chairman of the House Committee on the Judiciary, argued the cause on behalf of the House of Representatives, as *amicus curiae*.*

A challenge to the existence of any power in the Houses of Congress summarily to punish for a completed act interfering with the effectiveness of their inquisitorial power, goes deep into the structure of the Government. If Congress is indeed dependent upon the other branches for the facts necessary to guide its legislative judgment, then Congress is not in fact a responsible coördinate branch of the Government. But the denial goes farther. It is a denial of all summary power from any source to punish for a completed act interfering with legislative processes. If respondent's theory were sustained, such power would not only be withheld from the legislative branch; no other agency of government could exercise summary power in behalf of that branch. Whether or not even the slow, uncertain criminal procedure would be put in operation to support the Houses of Congress, seeking to discharge a constitutional duty, would depend entirely upon the other two branches of the Government. Under such an arrangement, it could not be held that Congress is a responsible, coördinate branch of the Government. Congress cannot be held responsible for not doing properly that which it does not have the power properly to do.

Punishment for interference with governmental processes is not punishment for a crime in the ordinary sense. It is a sort of consolidated power of government; of quick, direct action, originating out of necessity, which goes with certain duties assigned to the judicial and legislative branches of government as a protective and effectuating agency. If contempt were a crime in the ordinary sense, the individual proceeded against would be entitled under his constitutional guaranty to trial by jury. The legislative branch could not proceed at all; courts could not proceed except in the ordinary way.

The sole concern of this extraordinary governmental power is for governmental efficiency. Necessity initiates it, justifies it, and fixes its limits. This Court has provided the yard-stick. In *Anderson v. Dunn*, 6 Wheat. 204, 232, it says: "Analogy, and the nature of the case, furnish the answer—'the least possible power adequate to the end proposed.'" So measured, when there is an equality of need among the branches of the Government, there must be allowed an equality of power. To hold that a branch of the Government, manned by a personnel chosen directly by the people, answerable directly to the people, and removable directly by the people, may not be intrusted with enough power itself properly to protect itself and properly to discharge its constitutional responsibility, is an indictment of the scheme of representative government.

The House of Commons was never a part of the English judiciary. It drew no power or privilege of Parliament from that source. The House of Lords, when exercising judicial functions, did not do so as a part of the legislature. It is true that during the confusion of powers and the shifting of power back and forth among the King and Lords and Commons, each when powerful enough moved across the line of its natural jurisdiction. In isolated instances during those times the House of Commons attempted to exercise at least quasi judicial power; but suitors never resorted to the House of Commons. It was never recognized as a judicial tribunal and its attempts in that direction were always

*The substance of Mr. Sumners' oral argument is taken from a copy which was kindly furnished by him at the request of the Reporter.

challenged, and were abandoned more than a century before we wrote our Constitution. Even the judicial power of the House of Lords had practically ceased to exist at that time; it passed to the great law officers of the Government. Even the power to impeach had fallen into disuse. Since 1715 there have been only two cases of impeachment, according to the great English authority, Sir Erskine May. The development of Cabinet Government directly responsible to the House of Commons, the removal of judges by joint address, and the subjecting of all public officials to the jurisdiction of ordinary courts, removed the necessity for this power and with it went the power.

When we wrote our Constitution, most of these powers and privileges of Parliament had lost the support of necessity and fallen away, leaving the fiction instead of the fact of their existence. The privilege of judging of the election of its own members has since passed from the House of Commons to the judiciary. But this is significant: This power summarily to proceed against those who interfered with the discharge of legislative duties was as completely possessed and exercised by the Houses of Parliament at the time we wrote our Constitution as it had ever been. Not only was that true, but as the scope and difficulty of governmental responsibilities had increased, the importance and the frequency of exercise of the inquisitorial powers of Parliament had continued to increase. Those parliamentary powers and privileges which had ceased to be sustained by necessity fell away, while the powers, including this summary power, which were sustained by an increasing necessity, became more vigorous and more frequently exercised in proportion to that increasing necessity. That tendency has continued since our separation from Great Britain. As the affairs of government become more complex and as the forces with which government must deal in protecting the general public interest become stronger, better organized and more shrewdly advised, the necessity for a strong inquisitorial agency of government must increase. Access to documents is indispensable.

This power of the House of Commons to punish for a completed act which interfered with the effectiveness of its process came attached to the legislative branch into our Constitution, by adoption of that to which it was attached. The contemporaneous practices of Congress recognize this; and this Court, in *Anderson v. Dunn*, held to the limitation of judicial interference which obtained under the unwritten constitution. The effect of *Kilbourn v. Thompson* and subsequent opinions, leaves the former judicial and practical construction undisturbed insofar as the inquisitorial powers of Congress are concerned.

Did the writing of our Constitution make any material change in the general line of cleavage formerly established under our unwritten Constitution between the legislative and judicial branches of our government? The great struggles of English constitutional history had been to bring about a governmental arrangement under which these branches would possess each for itself an independent power adequate for the discharge of its duties and with the incidental purpose of fixing inescapable responsibility for their discharge. The facts of history leave no doubt on that point, nor do they leave any doubt that it was our purpose to preserve that arrangement. Did we succeed in doing so? Parliament enacted bills of divorce and attainder and some others which are semi-judicial. These powers were not denied to Congress under the written Constitution. They were denied to the Federal Government.

The Houses of Parliament passed private bills semijudicial in their nature, but each session of Congress we pass many private bills. Evidence is taken, witnesses are examined, argument had, judgment given, and money paid out of the Treasury. Yet the passage of these bills does not make the Houses of Congress part of the judiciary. The enactment of this character of legislation makes neither the Parliament nor the Congress a part of the judiciary.

Powers may be delegated to this Court to appoint inferior officers. The exercise of that power would not make this Court a part of the Executive branch of the Government.

The Senate sits in the trial of impeachment. That does not make it a part of the judiciary. The Senate sits in conference with the President on the appointment of executive and other officers. That does not make the Senate a part of the Executive.

We did not create a new Constitution as a result of the Revolution. All the pre-Declaration-of-Independence conventions and resolutions show, whether from small groups or from such sources as the Boston Convention and the Continental Congress, the demand of the Colonies was not for a new Government or for a new Constitution. The complaint was that King George and his Parliament

were violating our Constitution which had come down to us through the centuries as our heritage from our ancestors. We fought not to free ourselves from a Constitution, but to preserve it. Ours was not a true revolution. It was a territorial secession and a resort to arms to preserve our existing Constitution. When we wrote our Constitution we naturally brought forward in the main our former unwritten Constitution. On this point an analytical comparison of the unwritten and the written Constitution, the facts of our history and the weight of probabilities agree.

Whether the test of necessity laid down by this Court is to be applied for the Houses of Congress by the courts, or by the Houses of Congress for themselves, and answer given by them to the people for the method of exercise, may sometime become important; but in either case, it ought to be agreed that exercise of summary power by any branch of the Government ought always to fall within the limitations of necessity as laid down by this Court in *Anderson v. Dunn*.

With respect to making effective their procedure in getting facts upon which to base official action, the necessities of the legislative and judicial branches of the Government in all respects are identical. Their procedure is identical. Their need for protective and effectuating power is identical. If it be true that Congress is a responsible coördinate branch of the Government, it is difficult to conceive upon what political philosophy or notion of our system one of the coördinate branches, the judiciary, should be asked to deny to another coördinate branch a power to aid in doing its work, which power the branch of the Government of which the request is made finds necessary in the doing of an identical thing, of an identical importance, in exactly the same way, and by the same methods.

The power of the national legislature to guard and make respected and effective its own processes and the power of the judiciary by its intervention to stop the exercise of that power are directly in issue in this case. The possession of power by each of these branches to punish summarily those who interfere with its efforts to get the facts necessary to discharge a governmental duty, is not a blending or confusion of powers, but their separation. Such an arrangement gives to each the necessary power efficiently to do its work and thereby fastens upon each inescapable responsibility for properly doing its work. Such an arrangement also tends to the preservation of interdepartmental harmony and mutual respect and helpfulness. Without such an arrangement there cannot be responsibility. Without responsibility, there cannot be efficiency.

If the respondent's contention is sustained, a witness summoned *duces tecum* before the Senate, for instance, could assault the process server. That would be a completed act. He could not only refuse to respect the summons, but he could destroy the documents summoned, after service. He could bring them into the presence of the Senate and in its presence destroy the documents, and that destruction, being a completed act, would relieve him from all power of the Senate, coercive or otherwise. The Senate could only go to the other branches of the Government and tell them about it.

If the same limitation rested upon the power of this Court which respondent asks the court to declare with respect to the Houses of Congress, a document vital to a litigation could be destroyed after service of subpoena, possibly in the court room, and yet the Court could do nothing but appeal to the District Attorney. And if he were persuaded to act, punishment would still depend upon persuading the Judge, the grand jury, and each of the 12 petty jurors. Doubtless there are many interests in this country that would like to see that limitation put upon the power of the courts, as well as upon the Houses of Congress.

It is necessary to protect the interests of the private citizen against governmental oppression, and it is also necessary to preserve a sufficient strength in government to protect the interests of the people. Government, in order to be respected and to be able to protect the weak, must be strong enough to compel respect for its mandates.

In a definite sense, under the test of necessity provided by the Court, this is a fact case. The Houses of Parliament, before the Constitution was written, insisted upon this power as a matter of necessity, and public opinion agreed. They were experts on the question of need. The same is true with reference to the judiciary during that period. Since the writing of our Constitution, our judges, our members of Congress, British judges, and members of the British Parliament, by practice and formal action give their testimony that this power is a necessity.

Consider the place of the Senate in our Government, its relation to the people and the vast powers intrusted to it by the Constitution. And yet this Court is asked to hold that in a matter, however important, when the examination of documents is necessary, an individual who could help the Senate if he would, may be

guilty of every conceivable act of contempt and interference, may paralyze its inquisitorial machinery, and that there is no power by certain and speedy punishment to establish respect and compel obedience and cooperation. If that were to be held, upon what basis could the Congress claim to be a responsible coordinate branch of the Government, or upon what foundation of fact could the people hold it to that responsibility?

Mr. Frank J. Hogan, with whom *Messrs. Edmund L. Jones*, and *Duke M. Patrick* were on the brief, for respondent.

The acts complained of were past and completed acts.

The resolution and warrant and the other proceeding in the Senate, including the debate leading to the adoption of "the mode of procedure and rules" for the trial of the case, reveal the intention of the Senate to try a private citizen for a completed (alleged) offense, for the sole purpose of inflicting punishment as such.

The administration of punishment as such for a past and completed act is criminal rather than civil in character. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441.

Not only is punishment for crime a judicial function; not only, under our Constitution, is the judicial power sharply separated from the legislative and executive; but it is contrary to the spirit of our institutions to treat anything as a crime unless it be defined and its punishment fixed beforehand; or to permit imprisonment to be imposed, as punishment, by any branch of the Government except the judiciary. A person charged with crime is to be tried by a court presided over by a judge learned in the law, unbiased as to facts, and responsible to higher authority for failure to follow the usual methods of procedure—either by reversal or impeachment. He is not to be indicted, tried, judged and sentenced by a purely political body of our Government, where, after hearing the same evidence and being, presumably, governed by the same rules of law, partisan reasons may result in a division on the questions of guilt, and infliction of punishment based almost entirely on party lines; a body responsible to no higher authority for its ignoring of evidence or its disregard of settled law; from which, if the Senate's present position be sound, there is no appeal; against which no bill of impeachment can be brought.

Nor will it alter the character of the transaction to say that, even though designed and intended as a punitive measure, it would also have remedial effects. In the first place, the primary and not the incidental object is the one which controls the nature of the punishment. *Gompers v. Bucks Stove & Range Co.*, *supra*. In the second place, the record shows that under the circumstances it could not have had a remedial effect. The offense with which respondent was charged, when tested by any standard, constituted a criminal contempt.

In vain do we search the Constitution for any provision authorizing either House of Congress to try and imprison a private citizen for any offense.

By § 5 of Art. I, a House may punish its own members for violating its rules or disturbing its proceedings; and that is all. But there are other provisions which vest the entire judicial power of the United States in the federal courts exclusively (Art. III, § 1; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 328); and others which command that the trial of crimes, except in cases of impeachment, shall be by jury; that in all criminal prosecutions that the accused shall enjoy the right of a trial by an impartial jury; and that no person shall be deprived of life, liberty or property without due process of law.

In *Anderson v. Dunn*, 6 Wheat. 204, the first case on the subject, the sole question presented was whether the House of Representatives could take cognizance of contempts committed against themselves *under any circumstances*. This Court answered that question in the affirmative; but the case is no authority for the existence of a broad power, which, when formally exercised, cannot be the subject of judicial inquiry. The extent of the implied power, when any exists, was declared to be "the least possible power adequate to the end proposed," (6 Wheat. 231), which said Chief Justice White in *Marshall v. Gordon*, 243 U.S. 521, "was but a form of stating that as it resulted from implication and not from legislative will, the legislative will was powerless to extend it further than implication would justify."

The opinion in *Anderson v. Dunn* was criticized and limited in the next case on the subject, *Kilbourn v. Thompson*, 103 U.S. 168. There the contention was again made that the power of Congress or either House to punish a person not a member for contempt was a broad and unreviewable power. The Court noticed that the argument in favor of the existence of such a power rested, first, on its

exercise by the House of Commons of England, from which it was said we derived our system of parliamentary law; and, secondly, upon the necessity of such a power to enable the two Houses of Congress to perform their duties and exercise their express powers under the Constitution.

In answering these arguments, this Court pointed out that such power could not possibly be implied from the powers which the Constitution confers expressly without doing violence to the letter and spirit of the Constitution itself, the source of all all federal power whatsoever. Among other things, the Court discussed the difference between our legislative system and the English Parliament, observing that that difference had been judicially noticed and applied by the English Courts themselves in *Kielley v. Carson*, 4 Moore (P. C.) 63. The conclusion was that while, under certain circumstance, either House of Congress has power to deal with a contempt committed by a person not a member the exercise of the power is limited to cases where it is necessary to the proper performance of constitutional functions, and that judicial inquiry into the circumstances is contemplated by our constitutional form of Government and necessary for its preservation.

The Court there characterized the division of our Government into three grand departments—executive, legislative, and judicial—as one of the chief merits of our system, and declared it essential to the working of the system that persons entrusted with power in one of the branches shall not be permitted to encroach upon the powers confided to the others. In pointed out that the power of Congress itself, when acting through the concurrence of both branches, is a power dependent solely on the Constitution, and that such powers as are not conferred by that instrument, either by express grant or by fair implication from such grant, are reserved to the States or the people; that no general power of inflicting punishment was conferred upon Congress by that instrument, and that any such implication was repugnant to other express provisions, such as the due process clause of the Fifth Amendment, which had repeatedly been construed by this Court and others of the highest authority as requiring in such cases a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. To make what the court evidently regarded as a manifestly clear proposition doubly so, it was observed that of course neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in response to an express constitutional provision to that effect; and in declaring that the judicial power shall be vested in the Supreme Court and the inferior courts to be ordained by Congress, the Constitution in effect declares that no judicial power is vested in Congress or either branch of it, save in the cases specifically enumerated.

In *Marshall v. Gordon*, 243 U. S. 521, this Court applied these controlling principles to a situation essentially like the case at bar. In that case, decided as one of first impression, the Court said that the power of the House of Commons to punish directly for a variety of contempts rested upon an assumed blending of legislative and judicial powers which would be destructively incompatible with our tripartite form of Government. It declined to accept the argument that either House of Congress had such authority. The implied power “rests solely upon the right of self-preservation to enable the public powers given to be executed.” The power “does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation, that is, the right to *prevent* acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty, or the refusal to do that which there is an inherent legislative power to *compel* in order that legislative functions may be performed.” Reviewing the history of the subject since the adoption of the Constitution, this Court in that case was unable to discover a single instance where, in the exertion of the power to compel testimony, restraint was every made to extend beyond the time when the witness should signify his willingness to testify, the penalty of punishment for the refusal remaining controlled by the general criminal law, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration.

In the present case it is patent that the Senate now asserts on the ground of necessity the existence of practically the full power belonging to the House of Lords, though this Court has distinctly held that it has no such power by express grant or by analogy to that body.

We submit that the decision in *Marshall v. Gordon*, *supra*, a decision neither weakened nor destroyed in any subsequent case, clearly holds that while each House of Congress may have all power, by removal from its halls, and by coercive imprisonment, necessary to enable it to perform its constitutional duties, it is absolutely without power itself to impose punishment for a past act, which it may regard as contemptuous or a breach of its privileges. For such offenses, punishments must be inflicted by the courts, as for other crimes, and under the safeguard of all constitutional provisions.

This is not to say that there is no power to continue to deal with contemptuous conduct to prevent its continuance or immediate obstructive recurrence. The power so to deal, and the limitation thereof, are made crystal clear in the Chief Justice's opinion in the *Marshall* case. In *Kilbourn v. Thompson*, 103 U.S. 168, 182 *et seq.*, this Court gave emphatic and unqualified approval to the decision of the Privy Council in the English case of *Kicley v. Carson*, 4 Moore (P. C.) 63. In *Marshall v. Gordon*, *supra*, this Court again refers at length to *Kicley v. Carson*, and gives unqualified approval to the principal point there decided, namely, that the ancient power of the British Houses of Parliament to inflict punishment, as such, for contempts or other offenses, did not exist in such legislative bodies as the Houses of Congress of the United States.

The opinion in the *Marshall* case concedes that "when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority," "jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence, that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power." But no tenable argument can be made to uphold the contention that, after the papers which had been taken from respondent's office by Given had been returned and produced before and delivered to the Committee, the Senate, or any one else, could legitimately and fairly conclude that there was "necessity," in proceedings to punish in order to prevent immediate recurrence of respondent's act.

Congress has the right to preserve peace and decorum in its deliberations, to compel attendance of its members, to admit them to membership and to expel them, and to punish them for disorder; to keep order in the halls of Congress, and to that end to eject any one disturbing its deliberations, and to seize and hold him until he may be turned over to the proper authorities for trial and punishment if he has violated any law; and, as to witnesses, to force a witness to attend before either House, or any committee thereof, and to testify, or produce, under proper subpoena, material documents, and, as a means to that end, to coerce him by imprisoning him until he does attend and testify or produce.

For the offense committed by the past refusal to testify or produce, the penalty or punishment remains controlled by the general criminal law (see 243 U.S., p. 544).

Existing law (§§ 102-104 and 859, Rev. Stats.), enacted by both Houses, and approved by the Executive, would seem ample to provide for protection. But if anything be lacking, Congress may supply it by law. See *Marshall v. Gordon*, *supra*, p. 548.

McGrain v. Daugherty, 273 U.S. 135, solely concerned the power to arrest a citizen and bring him before the bar of the Senate to answer questions pertinent to an inquiry being properly conducted by the Senate. In it the principles established in the *Kilbourn* and *Marshall* cases were in no sense qualified.

The cases involving proceedings under the general criminal law to punish for conduct amounting to contempt, do not controvert, but admit, the accuracy of the rule contended for by respondent. In *re Chapman*, 166 U.S. 661; *Sinclair v. United States*, 279 U.S. 263. The *Chapman* case particularly recognizes and applies the basic difference between punishment as such and punishment which is merely an incident to a coercive measure. And this is twice pointed out in *Marshall v. Gordon*, 243 U.S. 521, at pages 542 and 547.

If, as petitioner contends, the Senate has the power to administer punishment as such, then, we ask, Why is this punishment confined (as petitioner concedes) to imprisonment only? Why has not the Senate the power to punish by fine or by both fine and imprisonment? If the Senate may impose a sentence for the definite period of ten days, why can it not impose one of ten months or two years? And lastly, why may not the imprisonment extend beyond the session? The answer is: Because the power is remedial and coercive only.

Marshall v. Gordon, supra, and *Toledo Newspaper Co. v. United States*, 247 U. S. 402, are clear illustrations of the fundamental difference between the legislative and judicial power to inflict punishment, as punishment, for contempt. *Ex parte Grossman*, 260 U. S. 87, recognizes and applies the difference between civil contempt and criminal contempt as pointed out in the case of *Gompers v. Bucks Stove & Range Co., supra*.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This petition for a writ of *habeas corpus* was brought in the Supreme Court of the District of Columbia by William P. MacCracken, Jr., against Chesley W. Jurney, the Sergeant-at-Arms of the Senate of the United States. The writ issued; the body of the petitioner was produced before that court; and the case was then heard on demurrer to the petition. The trial court discharged the writ and dismissed the petition. The Court of Appeals, two justices dissenting, reversed that judgment and remanded the case to the Supreme Court of the District with directions to discharge the prisoner from custody. 63 App. D.C. 342; 72 F. (2d) 560. This Court granted certiorari because of the importance of the question presented.

The petition alleges that MacCracken was, on February 12, 1934, arrested, and is held, under a warrant issued on February 9, 1934, after MacCracken had respectfully declined to appear before the bar of the Senate in response to a citation served upon him pursuant to Resolution 172, adopted by the Senate on February 5, 1934. The Resolution provides:

"Resolved, That the President of the Senate issue a citation directing William P. MacCracken, Jr., L. H. Brittin, Gilbert Givvin, and Harris M. Hanshue to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memorandums from the files of William P. MacCracken, Jr., after a subpoena had been served upon William P. MacCracken, Jr., as shown by the report of the Special Senate Committee Investigating Ocean and Air Mail Contracts."

It is conceded that the Senate was engaged in an enquiry which it had the constitutional power to make; that the Committee¹ had authority to require the production of papers as a necessary incident of the power of legislation; and that the Senate had the power to coerce their production by means of arrest. *McGrain v. Daugherty*, 273 U. S. 135. No question is raised as to the propriety of the scope of the subpoena *duces tecum*, or as to the regularity of any of the proceedings which preceded the arrest. The claim of privilege hereinafter referred to is no longer an issue. MacCracken's sole contention is that the Senate was without power to arrest him with a view to punishing him, because the act complained of—the alleged destruction and removal of the papers after service of the subpoena—was "the past commission of a completed act which prior to the arrest and the proceedings to punish had reached such a stage of finality that it could not longer affect the proceedings of the Senate or any Committee thereof, and which, and the effects of which, had been undone long before the arrest."

The petition occupies, with exhibits, 100 pages of the printed record in this Court; but the only additional averments essential to the decision of the question presented are, in substance, these: The Senate had appointed the Special Committee to make "a full, complete and detailed inquiry into all existing contracts entered into by the Postmaster General for the carriage of air mail and ocean mail." MacCracken had been served, on January 31, 1934, with a subpoena *duces tecum* to appear "instantly" before the Committee and to bring all books of account and papers "relating to air mail and ocean mail contracts." The witness appeared on that day; stated that he was a lawyer, member of the firm of MacCracken & Lee, with offices in the District; that he was ready to produce all papers which he lawfully could; but that many of those in his possession were privileged communications between himself and corporations or individuals for whom he had acted as attorney; that he could not lawfully produce such papers without the client first having waived the privilege; and that, unless he secured such a waiver, he must exercise his own judgment as to what papers were within the privilege. He gave, however, to the Committee the names of these clients; stated the character of services rendered for each; and, at the suggestion of the Committee, telegraphed to each asking whether consent to disclose confidential communications would be given. From some of the clients he secured immediately unconditional consent; and on February 1, produced all the papers relating to the business of the clients who had so consented.

On February 2, before the Committee had decided whether the production of all the papers should be compelled despite the claims of privilege, MacCracken

¹ Pursuant to Senate Resolution 349, 72nd Congress, Second Session.

again appeared and testified as follows: On February 1, he personally permitted Given, a representative of Western Air Express, to examine, without supervision, the files containing papers concerning that company; and authorized him to take therefrom papers which did not relate to air mail contracts. Given, in fact, took some papers which did relate to air mail contracts. On the same day, Brittin, vice-president of Northwest Airways, Inc., without MacCracken's knowledge, requested and received from his partner, Lee, permission to examine the files relating to the company's business and to remove therefrom some papers stated by Brittin to have been dictated by him in Lee's office and to be wholly personal and unrelated to matters under investigation by the Committee. Brittin removed from the files some papers; took them to his office; and, with a view to destroying them, tore them into pieces and threw the pieces into a wastepaper basket.

Upon the conclusion of MacCracken's testimony on February 2, the Committee decided that none of the papers in his possession could be withheld under the claim of privilege.² Later that day MacCracken received from the rest of his clients waivers of their privilege; and thereupon promptly made available to the Committee all the papers then remaining in the files. On February 3, (after a request therefor by MacCracken) Given restored to the files what he stated were all the papers taken by him. The petition does not allege that any of the papers taken by Brittin were later produced.³ It avers that, prior to the adoption of the citation for contempt under Resolution 172, MacCracken had produced and delivered to the Senate of the United States "to the best of my ability, knowledge and belief, every paper of every kind and description in his possession or under his control, relating in any way to air mail and ocean mail contracts; [and that] on February 5, 1934 . . . all of said papers were turned over and delivered to said Senate Committee and since that date they have been, and they now are, in the possession of said Committee."

First. The main contention of MacCracken is that the so-called power to punish for contempt may never be exerted, in the case of a private citizen, solely *qua* punishment. The argument is that the power may be used by the legislative body merely as a means of removing an existing obstruction to the performance of its duties; that the power to punish ceases as soon as the obstruction has been removed, or its removal has become impossible; and hence that there is no power to punish a witness who, having been requested to produce papers, destroys them after service of the subpoena. The contention rests upon a misconception of the limitations upon the power of the Houses of Congress to punish for contempt. It is true that the scope of the power is narrow. No act is so punishable unless it is of a nature to obstruct the performance of the duties of the legislature. There may be lack of power, because, as in *Kilbourn v. Thompson*, 103 U.S. 168, there was no legislative duty to be performed; or because, as in *Marshall v. Gordon*, 243 U.S. 521, the act complained of is deemed not to be of a character to obstruct the legislative process. But, where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance.

The power to punish a private citizen for a past and completed act was exerted by Congress as early as 1795;⁴ and since then it has been exercised on several

² Upon the conclusion of the hearing on February 2, the Committee made to the Senate a report (No. 254) setting forth the facts elicited. Thereupon the Senate, by Resolution No. 169, directed a warrant to issue, commanding the Sergeant-at-Arms to take MacCracken into custody before the bar of the Senate; "to bring with him the correspondence . . . referred to and then and there to answer such questions pertinent to the matter under inquiry . . . as the Senate may propound. . . ." The warrant was served on February 2, 1934; MacCracken was paroled in the custody of his counsel to appear at the bar of the Senate at noon, February 5, 1934. On that day (in view of Resolution No. 172) he was released from custody under Resolution No. 169; and the proceedings under Resolution No. 169 are not here involved.

³ But the brief for MacCracken, the respondent, states: "By February 6th every recoverable paper involved in the Brittin incident had been recovered and delivered to the Senate." The reference in the brief is to the fact (to which attention was called by counsel for Journey) that, after MacCracken and Brittin had testified, post office inspectors, acting for the committee, searched the sacks of waste papers taken from Brittin's office; and succeeded in collecting most of the pieces of the papers which Brittin destroyed. By pasting these pieces together they were able to restore for the Committee most of the papers removed from the Northwest Airways, Inc., files. Senate Document No. 162, 73rd Cong., 2nd Sess., pp. 106-116.

⁴ Robert Randall and Charles Whitney were taken into custody by the House of Representatives, on December 28, 1795, on charges of attempting to bribe some of its members. Whitney was discharged on January 7, 1796, before trial. Randall, however, on January 6, was found guilty of contempt and of a breach of the privileges of the House, was reprimanded by the Speaker, and was committed to the custody of the Sergeant-at-Arms until further order of the House. On January 13, his petition to be discharged from custody was granted, upon payment of fees. 5 Annals, 4th Cong., 1st Sess., 166-195, 232, 200-229, 237, 243.

occasions.⁵ It was asserted, before the Revolution, by the colonial assemblies, in imitation of the British House of Commons; and afterwards by the Continental Congress and by state legislative bodies.⁶ In *Anderson v. Dunn*, 6 Wheat. 204, decided in 1821, it was held that the House had power to punish a private citizen for an attempt to bribe a member. No case has been found in which an exertion of the power to punish for contempt has been successfully challenged on the ground that, before punishment, the offending act has been consummated or that the obstruction suffered was irremediable. The statements in the opinion of *Marshall v. Gordon*, *supra*, upon which MacCracken relies, must be read in the light of the particular facts. It was there recognized that the only jurisdictional test to be applied by the court is the character of the offence; and that the continuance of the obstruction, or the likelihood of its repetition, are considerations for the discretion of the legislators in meting out the punishment.

Here, we are concerned, not with an extension of congressional privilege, but with vindication of the established and essential privilege of requiring the production of evidence. For this purpose, the power to punish for a past contempt is an appropriate means.⁷ Compare *Ex parte Nugent*, Fed. Cas. No. 10,375; *Stewart v. Blaine*, 1 MacArthur 453. The apprehensions expressed from time to time in congressional debates, in opposition to particular exercises of the contempt power, concerned not the power to punish, as such, but the broad, undefined privileges which it was believed might find sanction in that power.⁸ The ground for such fears has since been effectively removed by the decisions of this Court which hold that assertions of congressional privilege are subject to judicial review. *Kilbourn v. Thompson*, *supra*; and that the power to punish for contempt may be extended to slanderous attacks which present no immediate obstruction to legislative processes. *Marshall v. Gordon*, *supra*.

Second. The power of either House of Congress to punish for contempt was not impaired by the enactment in 1857 of the statute, R. S. § 102, making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor. Compare *Sinclair v. United States*, 279 U.S. 263. The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses.⁹ That the purpose of the statute was merely to supplement the power of contempt by providing for additional punishment was recognized in *In re Chapman*, 166 U.S.

⁵ In 1832 Samuel Houston, having been arrested and tried by the House of Representatives for assaulting a member, was reprimanded and discharged on payment of fees. 8 Debates, 22d Cong., 1st Sess., 2512-2620, 2810-3022. In 1865, A. P. Field was taken into custody for assaulting a member and was reprimanded by the Speaker. 70 Globe, 38th Cong., 2d Sess., 991. So too, Charles C. Glover, in 1913. Cong. Rec., 63rd Cong., 1st Sess., 281-283, 499-503, 1431-1453. In 1870 Patrick Wood, for a similar offence, was imprisoned for three months by order of the House. 94 & 95 Globe, 41st Cong., 2d Sess., 4316-17, 4847, 5253, 5301. In 1795, Sen. James Gunn, whose challenge of a member of the House was considered a breach of privilege, escaped with an apology. 5 Annals, 4th Cong., 1st Sess., 786-790, 795-798. See Shull, *Legislative Contempt—An Auxiliary Power of Congress* (1934) 8 Temple L. Quart. 198.

⁶ See Potts, *Power of Legislative Bodies to Punish for Contempt* (1926) 74 U. of Pa. L. Rev. 691, 700-719; Clarke, *Parliamentary Privilege in the American Colonies*, Essays in Colonial History Presented to Charles McLean Andrews (1931), pp. 124, *et seq.*; May, *Law and Usage of Parliament* (5th ed., 1863), pp. 83-97. Since the American Revolution, it has been held that colonial assemblies of the British Empire, have, in the absence of express grant, and "without any usage, any acquiescence, or any sanction of the Courts of Law," no power to adjudicate upon, or punish for, contempts. *Kielley v. Carson*, 4 Moore P.C. 63; even when the contempt is committed in the presence of the Assembly by one of its own members. *Doyle v. Falconer*, L.R. 1 P.C. 328; *Barton v. Taylor*, 11 App. Cas. 197; compare *Whitcomb's Case*, 120 Mass. 118, 122. But upon some colonial assemblies contempt powers as broad as those of the British House of Commons have been conferred. Compare *Dill v. Murphy*, 1 Moore P.C. (N.S.) 487; *The Speaker of the Legislative Assembly of Victoria v. Glass*, L.R. 3 P.C. 560; *Fielding v. Thomas*, (1896) App. Cas. 600.

⁷ The many instances in which the Houses of Congress have punished contumacious witnesses for contempt are collected and discussed in Eberling, *Congressional Investigations* (1928). See, too, Dimock, *Congressional Investigating Committees* (1929); Landis, *Constitutional Limitations on the Congressional Power of Investigation* (1926) 40 Harv. L. Rev. 153; compare May, *op. cit.*, *supra*, pp. 407, 408. Witnesses found guilty of prevaricating before investigating committees have been imprisoned by the House of Commons under circumstances indicating that there was no thought of inducing further testimony, but only of punishing for the past offence. See case of Charles Woolfen, 112 Comm. Jour. 354, 372, 377; of Acton, Sheriff of London, Petyt, *Miscellanea Parliamentaria* (1680) p. 108; of Randolph Davenport, *Id.*, p. 120.

⁸ See remarks of Sen. Charles Pinckney in the case of the Editor of the Aurora, 10 Annals, 6th Cong., 1st Sess., 69; of Rep. Barbour and Rep. Poindexter in the case of Colonel Anderson, 32 Annals, 15th Cong., 1st Sess., 624, 654; of Rep. Polk in the case of Samuel Houston, 8 Debates, 22d Cong., 1st Sess., 2512; of Sen. Sumner in the case of Thaddeus Hyatt 53 Globe, 36th Cong., 1st Sess., 1100; see, too, Jefferson's Manual §§ 293-299.

⁹ See remarks of Rep. Orr, 43 Globe, 34th Cong., 3rd Sess., 404, 405.

661, 671-672: "We grant that Congress could not divest itself or either of its Houses, of the essential and inherent power to punish for contempt in cases to which the power of either House properly extended; but because Congress, by the Act of 1857, sought to aid each of the Houses in discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved: and the statute is not open to objection on that account." Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offense. Compare *Ex parte Hudgings*, 249 U.S. 378, 382.¹⁰ As was said in *In re Chapman*, *supra*, "the same act may be an offense against one jurisdiction and an offense against another; and indictable statutory offenses may be punished as such while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together."

Third. MacCracken contends that he is not punishable for contempt because the obstruction, if any, which he caused to legislative processes, had been entirely removed and its evil effects undone before the contempt proceedings were instituted. He points to the allegations in the petition for *habeas corpus* that he had surrendered all papers in his possession; that he was ready and willing to give any additional testimony which the Committee might require; that he had secured the return of the papers taken from the files by Givven, with his permission; and that he was in no way responsible for the removal and destruction of the papers by Brittin. This contention goes to the question of guilt, not to that of the jurisdiction of the Senate. The contempt with which MacCracken is charged is "the destruction and removal of certain papers." Whether he is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposes to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of *habeas corpus* is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes. Compare *Barry v. United States ex rel. Cunningham*, 279 U.S. 597; *Henry v. Henkel*, 235 U.S. 219; *Matter of Gregory*, 219 U.S. 210.

The judgment of the Court of Appeals should be reversed; and that of the Supreme Court of the District should be affirmed.

Reversed.

MR. JUSTICE McREYNOLDS took no part in the consideration or decision of this case.

MARCH 29, 1973.

MEMO FOR THE RECORD

From: J. L. Pecore, Assistant Counsel, Subcommittee on Separation of Powers.
Subject: Subpoena by the Senate for contempt, background information, *Jurney v. MacCracken* (294 U.S. 125).

Reference: Telephone conversation with Mr. Arthur B. Caldwell (654-5136) 3414 Thornapple Street, Chevy Chase, Maryland 20015.

Mr. Caldwell telephoned on March 20, 1973, and stated that he was an attorney retired in 1968 from the Department of Justice and that prior thereto had served on the office staff of Senator Joseph T. Robinson during Senator Robinson's service as Democratic Minority Leader under the Hoover Administration and as Majority Leader under Franklin Roosevelt.

Mr. Caldwell stated that he was calling with respect to the present interplay between the Senate and the White House relative to the matter of obtaining the appearance of members of the President's personal staff before Senate Committees. He stated that he had observed a portion of Senator Ervin's appearance on the "Face the Nation" television program of March 18, 1973, during which program Senator Ervin had referred to the use of subpoena powers if necessary to obtain the appearance of members of the Executive Branch who had declined invitations to testify.

Mr. Caldwell then referred to the case of *Jurney v. MacCracken*, in which the Supreme Court of the United States reviewed the effects of Mr. MacCracken's failure to produce documents before a Senate Committee. Mr. Caldwell stated that he had been personally involved in the tactics and maneuvers utilized in

¹⁰ Samuel Houston was in fact indicted, convicted and fined in the criminal court of the District of Columbia on account of the same assault for which he was reprimanded by the House. See 2 Ops. Atty. Gen. 655.

the *MacCracken* case, through which MacCracken had been placed under arrest by the Sergeant at Arms of the Senate, Mr. Journey.

According to Mr. Caldwell, Senator Hugo Black of Alabama was serving as chairman of the Commerce Committee of the Senate and investigating the airlines of the United States under airmail postal contracts. The Commerce Committee had subpoenaed certain airline records which were held in the possession of Mr. MacCracken.

Mr. MacCracken represented the airlines companies, was a noted attorney and at that time was president of the American Bar Association. After the subpoena was issued by the Senate Committee, Mr. MacCracken destroyed these records by dumping them into the incinerator at the National Press Club, where later, investigators for the Senate Committee found unburned portions of those records, according to Mr. Caldwell.

Senator Black was determined to arrest and bring Mr. MacCracken onto the floor of the Senate for summary trial and punishment by the Senate for contempt, without permitting Mr. MacCracken to obtain a writ of *habeas corpus* and thereby have the matter of his arrest thrown into the court system, which would delay interminably his trial by the Senate. To accomplish this, it was planned that Mr. MacCracken be arrested under a warrant issued by the Senate empowering the Sergeant at Arms of the Senate, Mr. Journey, to make the arrest, and bring him to the Senate for trial.

In order for the Senate to acquire jurisdiction over Mr. MacCracken in a manner which would avoid a *habeas corpus* action it was considered necessary that his arrest be made *only* during those hours of the day in which the Senate was actually in session and that Mr. MacCracken be brought immediately to the floor while the Senate was in session.

MacCracken was well represented by the late Frank Hogan, who became famous as the attorney who got Doheny acquitted of the charge of bribing Secretary of the Interior, Albert Fall, (Harding Administration) after Secretary Fall had been convicted of accepting the bribe. Doheny paid Hogan's fee by a single check in the amount of one million dollars.

Attorney Hogan had advised his client to go into hiding during such hours as the Senate was in session, and as soon as the Senate would recess for the day or evening, then Hogan would telephone Journey that MacCracken was available in his (Hogan's) office ready to surrender. But what Hogan never told Journey, but what the Sergeant at Arms knew, was that Hogan had prepared in advance a petition for writ of *habeas corpus* complete except for inserting the dates, signature and notarization, which would be supplied the moment Journey appeared and arrested MacCracken. Then, of course the petition would be complete and be taken to the nearest federal judge, and the matter would then be in the courts for some time.

At such times as the Senate was not in session, Journey made no effort to locate MacCracken and kept the warrant in his safe in the Office of the Sergeant at Arms.

This cat and mouse game of Journey and his assistants searching for MacCracken during the hours the Senate was in session, and stopping the search when the Senate recessed (and then have MacCracken come out of hiding asking to be arrested, only to disappear again when the Senate reconvened) continued for some time, several days or weeks. It continued until Attorney Hogan determined to force Journey to arrest MacCracken by the following plan, as related by Mr. Caldwell:

One evening after the Senate had recessed, around 6 P.M., Hogan had MacCracken go uninvited and unannounced to Journey's apartment in the Methodist Building and knock on Journey's front door. When it was opened MacCracken walked right in, just as Journey and his wife were starting to eat their dinner.

Once inside Journey's apartment, MacCracken said to Journey, "I understand you have a warrant for my arrest. Here I am, arrest me."

Journey replied, "I am sorry, Bill, but I don't have the warrant with me at this time. I left it in my safe in the Sergeant at Arms office in the Capitol, but won't you join us at dinner?" MacCracken declined the invitation to dine with Journey and his wife and instead sat down in the living room while Journey and his wife proceeded with their dinner.

Shortly, perhaps 20 or 30 minutes later, there came another knock on Journey's front door, and when opened, in walked, also uninvited, a young lady from Hogan's law office who was a notary public.

She immediately walked over to MacCracken, asked him to raise his right hand, and swear that he was under arrest and being detained against his will by Mr. Jurney. She then affixed her notary seal to the petition she brought along and walked out of Jurney's apartment leaving MacCracken there. Her visit was, of course, part of Hogan's plan—and outside she was joined by Hogan who took the petition and went straight to Judge O'Donohue's residence. O'Donohue was one of the local Federal District judges.

Judge O'Donohue examined the petition and finding it in order, issued the writ and set the case for 10 o'clock the next morning.

At the hearing the next morning it quickly developed that the only issue was whether MacCracken had in fact been arrested and held against his will, as the petition alleged.

Mr. Jurney testified that he had made no move to arrest Mr. MacCracken or in any way restrain or detain him. He just let Mr. MacCracken stay in the living room of the apartment. He added that he left his front door unlocked all night so that Mr. MacCracken could leave any time he desired.

MacCracken's attorney, Mr. Hogan, contended there was, however a constructive arrest, because MacCracken had surrendered to Jurney in Jurney's home, and, even though Jurney never actually had the warrant in his hands at the time, such was not necessary because there was a warrant in existence, Jurney knew it and the warrant by its own words commanded that Jurney go forthwith and arrest the body of one William P. MacCracken. Therefore, said Hogan, there was a constructive arrest because of the words of the warrant required Jurney to make the arrest.

After the testimony revealed that Jurney did not serve the warrant but instead had declined to do so, and did not take MacCracken into custody, the Judge turned to MacCracken and said:

"I have three questions to ask the petitioner. Mr. MacCracken, will you take the stand?"

Judge: "Did Mr. Jurney tell you that you were under arrest?"

MacCracken: "No, he did not."

Judge: "Were you free to come and go in his apartment?"

MacCracken: "I guess I was, I understand now that he left his front door unlocked."

Judge: "Did Mr. Jurney lay his hands on you at any time?"

MacCracken: "No, he did not touch me."

Judge: "One more question; are you a lawyer?"

MacCracken: "Yes, your Honor."

Judge: "Step down, Mr. MacCracken and explain to this court why you should not be held in contempt for alleging under oath that you were under arrest when in fact you were not."

MacCracken: "I assumed that I was under a form of arrest and I was acting on the advice of counsel."

The judge then fined Mr. MacCracken \$100.00 for contempt which his lawyer promptly paid. The hearing ended and the case was dismissed.

By that time it was noon, the court recessed for lunch and all participants walked out the front door of the court house just as the clock struck 12 o'clock. Mr. Jurney, knowing that the Senate was at that moment beginning its session for the day, pulled the arrest warrant out of his pocket and placed MacCracken under arrest as he walked down the court house steps. He was then taken in custody and rushed to the Senate where contempt charges were placed against him. He was summarily tried on the floor of the Senate. The proceedings were recorded and should be available somewhere in the archives of the Senate.

Mr. Caldwell continued that during the trial in the Senate which lasted several days, a suite of rooms (known as the old Coolidge suite) on the fourth floor of the Willard Hotel served as a temporary "jail" or detention, and Mr. Mark Trice and himself were assigned as guards or "Jailer" to remain with Mr. MacCracken at all times he was not being tried in the Senate. He was convicted by vote of the Senate and sentenced to ten days in jail, which he served in the local District jail.

The matter reached the Supreme Court of the United States (*Jurney v. MacCracken*) but as recalled by Mr. Caldwell, the issue there did not deal with the manner of the accused's apprehension but rather on whether the Senate could try summarily a person charged with contempt. Mr. Caldwell stated that he attended the session of the Supreme Court, but was not impressed with either the argument of the Senate which was made by the U.S. Attorney Leslie Garnett,

nor with the argument of MacCracken's lawyer, but the then Chairman of the House of Representatives Judiciary Committee, Mr. Hatton Summers, appeared in the role as *amicus curiae* for the House and gave a thorough and scholarly presentation on the history of the power to punish summarily that parliamentary bodies have had throughout history. Mr. Caldwell suggested that a copy of his brief might be helpful, in the event an arrest is made and contempt proceedings are instituted.

Mr. Caldwell further related: "The above is strictly from memory of an event that occurred back in the thirties, and one may wonder that I have remembered so much detail. The reason is that I was a young law school student attending George Washington Law School at night and on the patronage roll of the Senate. I was aware that I was playing a part, if only a minor role, in what was undoubtedly a unique and historic case, being extremely interested and excited by the events, they made a lasting impression on my mind. I have tried many cases, since as prosecutor and representative for the Government, but none made such a lasting impression on my mind, for it was unique and I realized it."

Respectfully submitted.

(S) ARTHUR B. CALDWELL,
3413 Thornapple Street,
Chevy Chase, Maryland 20015.

The above information was originally noted from the above mentioned telephone call. My rough draft was submitted to Mr. Caldwell by mail, who corrected and amplified the draft and returned it to me for revision into its above form.

Respectfully,

J. L. PECORE,
Assistant Counsel, Subcommittee on Separation of Powers.

EXECUTIVE PRIVILEGE

PART 5—CONFIDENTIALITY IN THE JUDICIARY

APRIL 7, 1973.

HON. ROWLAND F. KIRKS,
*Director, Administrative Office of the United States Courts, Supreme Court
Building, Washington, D.C.*

DEAR MR. KIRKS: The Subcommittee on Separation of Powers and the Subcommittee on Intergovernmental Relations will conduct joint hearings on the 10th, 11th, and 12th of April, 1973, on the subject of "Executive Privilege and Government Secrecy". It has been brought to my attention that a corollary to this field exists in the practice of what might be termed "Judicial Conference privilege". It seems that certain papers and documents used by Judicial Conference committees in writing new rules of procedure for the Federal Courts are kept confidential, apparently by unilateral decision of the Administrative Office of the United States Courts.

In brief, as described in the attached copy of a letter written by Carl Baar, Visiting Assistant Professor, Department of Political Science, the University of Michigan, to Professor Arthus S. Miller, Consultant to the Separation of Powers Subcommittee,¹ documents made use of by the judiciary are not available to the public or to serious students of the judicial process.

I am aware of no reason why the work of the Judicial Conference and its committees, including its advisory committees, should not be made available to the Congress and the public. With that information as background I should like to request that you inform the Separation of Powers Subcommittee of the extent and nature of the practice of keeping Judicial Conference matters—particularly of its advisory committees—secret, and the legal basis therefor. In this connection, it would be most helpful if you would furnish the Subcommittee with a history of the practice of withholding information on the part of the Conference since its establishment.

I believe that the foregoing is important, both for the Congress and for members of the public. The Congress, as you know, this year for the first time has delayed the promulgation of the Proposed Rules of Evidence drafted by the Judicial Conference. I should think that it would be very useful for the Congress to have made available to it the files of the Advisory Committee concerning the rules of evidence. As for the public, there is both a scholarly interest (as with Professor Baar) and, of more importance, the interest of all who are involved in the federal judicial process, to know such matters as Professor Baar outlines—the factors entering into sentencing in criminal prosecutions—plus other data considered important by judges.

Thank you for your cooperation.

With all kind wishes, I am

Sincerely yours,

SAM J. ERVIN, Jr.,
Chairman.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURT,
Washington, D.C., April 18, 1973.

HON. SAM J. ERVIN, Jr.,
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: This is in response to your letter of April 7, 1973, requesting my comments on allegations which have been made to your committee

¹ See p. 337.

that a practice has developed which might be called "Judicial Conference privilege" and that certain Conference documents are regarded as confidential. I do not believe these allegations can be sustained.

The Judicial Conference was, as you know, created by the Congress and charged with certain duties relating primarily to the operation of the federal district courts and the courts of appeals, the assignment of judges, the consideration of proposed rules of practice and procedure, and the furnishing of comment to the appropriate committees of the Congress, when requested, on legislative proposals affecting the court system. The Chief Justice, as Chairman of the Conference, is required by law to render a report on the proceedings to the Congress. This is a public document and is widely distributed after it is transmitted to the Congress.

The Conference, which now meets regularly twice a year, considers the reports of its committees. At present there are thirteen regular committees of the Conference, two ad hoc committees, and four advisory committees to the Committee on Rules of Practice and Procedure. The meetings of the Conference and the committees are not recorded but a careful account of the action taken at these meetings is kept. On some occasions, to assist the reporter of the committee, some proceedings of the advisory committees have been recorded. In recent years, for lack of manpower, these have not been transcribed but the tapes are available to the reporter to assist him particularly in drafting advisory committee notes to rules or proposed rules.

Reports of Judicial Conference committees are often widely circularized among the bench and bar for their information. In 1951 the Judicial Conference approved the release of the report on *Procedure in Antitrust and Other Protracted Cases* and a report on *Procedures for Administrative Agencies*. Similarly in 1960 the Conference authorized the release of the report of its Committee on the Operation of the Jury System and the *Handbook of Recommended Procedures for the Trial of Protracted Cases*. In 1964 the Conference authorized the release of the *Handbook for Effective Pretrial Procedure*. Committee reports on legislative matters, when approved by the Conference, are regularly made available to the respective committees of the Congress. Other reports are released when approved by the Conference.

The relationship of my office to the Judicial Conference and its committees is in the furnishing of staff assistance to them. I have the physical custody of the Conference and committee files but I have no authority over the dissemination of any materials in these files. I can say, however, that reports of Conference committees to the Conference, other than those which are directly ordered released and disseminated by action of the Judicial Conference, are generally made available for examination in the Administrative Office by scholars and others interested. In many instances, of course, the published proceedings of the Conference contain the substance of these reports.

The committees of the Conference operate through many subcommittees, some formally constituted, as for example, the Subcommittee on Supporting Personnel or the Subcommittee on Judicial Statistics of the Committee on Court Administration. Most, however, are informally constituted to consider a specific problem or matter for report back to the parent committee. These usually function on their own, without staff assistance or the keeping of any records other than what may be needed to transmit their conclusions and recommendations. As far as I can ascertain, Professor Baar's concern relates to a survey made by one of these groups to aid it in its deliberations. I would have no authority other than that granted me by the committee or ad hoc group itself to release its materials or work papers even though they be in my physical custody and even though a member of the group may have released certain information secured by members of the group in making a survey of the reactions of judges to a given problem or suggestion. I do not regard these papers as classified in any sense or as privileged. They are unpublished work papers such as any governmental or private group may acquire and which are always regarded as the property of that group.

Certain additional observations apply to the advisory committees on rules of practice and procedure. Every effort is made by the Conference to secure the full cooperation of the bench and bar of the country in the drafting of these rules. First of all, membership of the Judicial Conference committees includes judges, legal scholars and lawyers representing various diverse interests. Rules and advisory committee notes are carefully drafted by reporters of the committees, usually college professors, which are considered by the respective advisory committees. When drafts are agreed upon, they are widely circulated

to the bench and bar for comment. Regularly, one year or more is set aside for the receipt of these comments. Drafts of rules are then reviewed in the light of comments, changes are made as appropriate both in the rules themselves and in the comments thereto and a report is then rendered to the standing committee of the Judicial Conference on Rules of Practice and Procedure for its consideration. The standing committee in turn reports to the Judicial Conference, which then reports to the Supreme Court and in accordance with statute the Supreme Court reports to the Congress. The matters considered in this process consist of the draft rules themselves and the advisory committee notes explaining the rules. Drafts, working papers, memoranda, and other materials used by the advisory committees are not made available to the Judicial Conference, the Supreme Court and the Congress. Accordingly, the rules, as explained in the advisory committee notes, stand on their own. The working files of the advisory committees are thus not released generally since the rules are approved not on the basis of what might be mentioned in the advisory committee files, but on the language of the rules themselves and the advisory committee notes which are available to everyone.

For this reason the working files of the advisory committees, by direction of every Chief Justice since Charles Evans Hughes, has not been released. The reasons behind this policy are sound. Advisory committees frequently do not approve the language of drafts initially prepared by reporters and sometimes are never seriously considered. These papers obviously have no relation to the meaning of the rules as finally adopted. To open them could serve only to foment an unproductive litigation.

With reference to the proposed rules of evidence, in fact, the comments made by the bench, bar and public generally over the course of the several submissions of these proposed rules for comment, have been made available for review since the Congress indicated it would hold hearings on the proposed rules, and in testimony before the Subcommittee of the House Judiciary Committee, Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure, suggested that the subcommittee staff might wish to review these comments.

I trust these observations have been helpful. If there is any other way I can assist you in this matter, I hope you will call upon me.

Sincerely,

ROWLAND F. KIRKS, *Director*.

MAY 24, 1973.

HON. ROWLAND F. KIRKS,

Director, Administrative Office of the United States Courts, Supreme Court Building, Washington, D.C.

DEAR MR. KIRKS: Thank you for your letter of April 18, 1973, responding to the questions in my letter of April 7, 1973. I read your answers with great interest. However, your reply brings to mind several other questions to which I would appreciate your answer at your earliest convenience.

1. In my letter dated April 7, 1973, you were asked to "inform the Separation of Powers Subcommittee . . . of the legal basis . . ." for keeping working papers and other matter of the Judicial Conference secret. You failed to cite any legal authority for such a practice, other than saying that it is done ". . . by direction of every Chief Justice since Charles Evans Hughes. . . ." Kindly provide any constitutional or statutory authority for such a policy.

2. You say that the reasons behind this policy "are sound." But you give only one such "reason": that it would "serve only to foment an unproductive litigation" because some of the initial papers ". . . have no relation to the meaning of the rules as finally adopted." How do you know: (a) that litigation would take place; and (b) that it would be unproductive? In your reply, you may wish to comment on the proposition that it is the duty of courts to decide cases as they are brought, regardless of their derivation.

3. You state in your letter that "unpublished work papers . . . are *always* regarded as the *property* of the group" (emphasis supplied). Under what existing law can it be said that such papers are the "property" of public officials? Please cite statutes and case authority, if any, in your reply. In addition, please inform me of which other governmental officers have asserted a similar position.

If the working papers, in your words, are neither "classified in any sense" nor "privileged," then what is the legal doctrine you invoke to keep them secret? In this connection, I add that I am unable to comprehend the principle that permits

the papers of public officials, either full-time or in an advisory capacity, to be their private property.

4. Have steps been taken, similar to that of Judge Clark (as noted on page 5 of Professor Baar's letter previously sent you) to release at some time the complete files of Judicial Conference committee's work? If not, why not?

I appreciate your providing this information for it is helpful to the Subcommittee in its investigation of secrecy in government.

With all kind wishes, I am

Sincerely yours,

SAM J. ERVIN, Jr.,

Chairman, Subcommittee on Separation of Powers.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Washington, D.C., May 30, 1973.

Hon. SAM J. ERVIN, Jr.,

*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This will acknowledge receipt of your letter of May 24, 1972, addressed to Mr. Kirks, the Director of the Administrative Office. Mr. Kirks is out of the city attending a circuit conference. Your letter will be brought to his attention promptly upon his return.

Sincerely,

WILLIAM E. FOLEY,
Deputy Director.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Washington, D.C., June 8, 1973.

Hon. SAM J. ERVIN, Jr.

*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Upon my return to Washington I have examined carefully your letter of May 24, 1973 which raises several questions relating to our earlier correspondence on the subject of the files of the Judicial Conference of the United States.

As I review my letter to you of April 18, 1973, I find it difficult to add any further information or comment since I made every effort at that time to give you a full account of my knowledge of the Conference files. You will understand that I am not a member of the Conference myself but I am bound by any position taken by the Judicial Conference.

I can advise you, however, that in the three years since I have been Director of the Administrative Office I am not aware of any instance in which it has been necessary to decline to furnish any information in the Conference files. I have caused a special inquiry to be made into the particular report which Professor Baar sought and I have learned that the report in question was made by a subcommittee of the Judicial Conference Committee on the Administration of the Probation System. It consisted of the results of a questionnaire sent to all federal judges by the subcommittee seeking their comments on an amendment to the Federal Rules of Criminal Procedure. In soliciting the views of the federal judiciary many if not all judges were given to think that their replies would be held in confidence and only the summary of replies would be made available to the Advisory Committee on Criminal Rules. For this reason my staff declined to make the report available to anyone other than the members of the Probation Committee. I have learned, however, that one judge has in fact made a public commentary on these replies and in the circumstances I would regard the pledge of confidentiality as no longer binding. If Professor Baar still has an interest in reviewing the report in question he may certainly examine it.

Sincerely yours,

ROWLAND F. KIRKS,
Director.

JULY 18, 1973.

Hon. ROWLAND F. KIRKS,
Director, Administrative Office of the United States Courts, Supreme Court Building, Washington, D.C.

DEAR MR. KIRKS: Thank you for your letter of June 8, 1973. I certainly appreciate your effort in your letter to me of April 18, 1973, to give me a full account of your knowledge of the Conference files. In that letter you stated that the papers of the members of the Conference are their property. Because the property concept concerning papers of public officials is of great interest to the Subcommittee in its study of public access to government information and government secrecy, I would appreciate your comments on the concept of papers of public officials as their private property vis-a-vis public property. Of course, I refer to documents and papers relating to matters over which you have jurisdiction.

With all kind wishes, I am
 Sincerely yours,

SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers.

ADMINISTRATIVE OFFICE OF THE
 UNITED STATES COURTS,
 Washington, D.C., August 2, 1973.

Hon. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am sorry to have delayed so long in replying to your further letter of July 18th regarding Judicial Conference files. The delay has been the result of my absence from the office on official business.

In your letter you ask for my comments "on the concept of papers of public officials as their private property vis-a-vis public property," indicating further that you are referring to "documents and papers over which [I] have jurisdiction."

My comments can be very brief. I do not regard any paper or document generated by me in my official capacity as Director of this office to be private property. The same principle applies to papers and documents generated by subordinates in the course of the business of this office. All such papers are public property.

Sincerely yours,

ROWLAND F. KIRKS,
Director.

DEPARTMENT OF POLITICAL SCIENCE/THE UNIVERSITY OF MICHIGAN,
 Ann Arbor, Mich., April 2, 1973.

Prof. ARTHUR S. MILLER,
*National Law Center,
 George Washington University,
 Washington, D.C.*

DEAR PROFESSOR MILLER: This letter will provide you, in your capacity as consultant to the Senate Subcommittee on the Separation of Powers, with information regarding the privileged nature of certain nonadjudicatory materials generated and used by the federal judicial branch.

As a political scientist studying the organization and behavior of courts, I have for the past several years gathered material on federal judicial administration. My doctoral dissertation examined the lobbying activities of federal judges on matters of court administration. As part of my current research, I have examined the organization and operation of the federal rule-making process, in which committees of judges, lawyers and law professors, working under the authority of congressional statute and the supervision of the Judicial Conference of the United States, draft procedural rules for the trial and appeal of cases in the federal courts.

Rule-making by judicial committee is an important structural innovation which represents an effort to strengthen judicial independence by facilitating the ability of the judicial branch to meet its internal needs. At the same time, the decision-making process of the rules committees is largely hidden from public scrutiny. When a committee proposes revisions of existing rules (e.g. Federal Rules of Civil Procedure), it will circulate a preliminary draft of these proposals, along with "Advisory Committee Notes" explaining the legal and practical grounds for the changes, to the legal community for comment and criticism. When a committee proposes an entirely new set of rules (e.g. Federal Rules of Evidence), the same procedure is followed. However, it is the policy of these committees not to circulate, or to make public, records or transcripts of meetings, copies of memoranda or working papers prepared by or for the committees, or votes of members. Thus the committees' information policy is more restrictive than that of the United States Supreme Court, which holds oral argument in public and makes public the printed briefs prepared for the justices. It is also more restrictive than the information policies of congressional committees, since legislative hearings are published, and legislative debate is open to the public and printed daily. The Judicial Conference hears the recommendations of its rule-making committees (and its other standing committees) at closed meetings, out of which only a summary of proceedings is released.

A particularly flagrant example of "judicial committee privilege" is the federal judiciary's refusal to make public a document printed in November 1964, titled "Judicial Opinion on Proposed Change in Rule 32(C) of the Federal Rules of Criminal Procedure: A Survey." The survey was requested by the Committee on the Administration of the Probation System of the Judicial Conference, and was conducted by New Jersey federal judge Thomas M. Madden, a committee member. The survey was prompted by proposals circulated by the Advisory Committee on Criminal Rules to amend Rule 32(C) making it compulsory to disclose the contents of a presentence report to a defendant or his attorney. Under existing language, disclosure was at the discretion of the individual trial judge. The survey showed widespread opposition to the compulsory disclosure proposal, and the rule change was dropped in the final draft which became effective in 1966. The Advisory Committee on Criminal Rules again proposed compulsory disclosure of presentence reports in revisions circulated in 1969, but the change was again dropped.

On November 11, 1970, I wrote Mr. William E. Foley, Deputy Director of the Administrative Office of the United States Courts, asking if it would be possible to obtain a copy of the survey. I had spoken with him in the past and he was familiar with my research interests. He replied that the material was not available because it had "always been regarded as confidential and made only for committee guidance." A few months afterwards, I discovered that the survey was cited by the late federal judge Edwin M. Stanley of North Carolina in the 1968 volume on *Standards Relating to Sentencing Alternatives and Procedures* in the American Bar Association Project on Minimum Standards for Criminal Justice. Stanley dissented from the ABA recommendation favoring compulsory disclosure, cited statistical data from the 1964 survey and suggested that readers consult the survey report for "other convincing arguments opposing compulsory disclosure." (pp. 303-305) Surprised that a document would be freely cited and yet withheld from the public, I asked the Acquisitions Librarian of the Yale Law School, where I was then holding a postdoctoral fellowship, to inquire about the survey. She was told on March 10, 1971, by the Administrative Office that the publication "is not available for distribution." Since she knew the Law Librarian at the Library of Congress, she asked him to try as well, but he was also told that the item was strictly unavailable and very confidential. (Shortly thereafter, the Supreme Court held in the New York Times case that publication of the "Pentagon Papers" could not be enjoined, prompting a letter-to-the-editor which is attached.)

It is my understanding that refusal to make public the 1964 survey simply carries out the general Judicial Conference policy that materials used by its committees are confidential. Applying such a rule to the 1964 survey is particularly questionable, since the survey is not an interoffice memo but a document of several hundred pages which was duplicated and apparently widely circulated at the time. In fact, I had access to a copy of the survey in 1970 through private sources unaware that it was deemed confidential by the federal judiciary.

My reading of the survey indicates two reasons, among others, which would make its public release particularly valuable. First, it could be examined by social scientists who could critically evaluate its validity. Such an examination would be likely to discredit the survey's validity. For any survey to be valid, it must ask questions in an objective way that does not encourage the respondent to answer the way the questioner wishes. In the 1964 survey, however, Judge Madden's cover letter to the district judges expressed his opposition to the rule change in strong language that could have biased the results, and would have at least undermined their acceptance. He called the change "unsound and legally dangerous in principle," and asked respondents to "consider the damage it can cause to our probation system."

It would also be invalid to interpret the survey findings as opposition to the principle of compulsory disclosure. (Judge Stanley did so in using the findings in the ABA report.) In fact, the survey question asked about support of or opposition to the specific wording of the then-pending proposal, which distinguished between defendants with or without counsel in a way which Judge Madden argued was particularly questionable as a "double standard." Thus both the wording of the question and the language of the cover letter encouraged opposition to compulsory disclosure, leaving the precise meaning of the data in doubt.

Second, the arguments and facts presented by survey respondents could have suggested that serious questions of fundamental fairness in the sentencing process do exist. For example, the Chief Judge of the Southern District of New York included a lengthy memo from his Chief Probation Officer, who argued that non-disclosure facilitated access to confidential information from law enforcement agencies:

Many times we learn of investigations which are in progress on which no arrest has been made or no indictment returned. We include this information in the Presentence Reports because it is important for the sentencing Judge to have all the knowledge we can gather about the defendant, but it would be most unfortunate to have this kind of information disclosed to the defense attorney or to the defendant himself.

The inclusion of this kind of information means that federal judges could be basing their sentencing decisions in part upon the possibility that a defendant may have committed another offense—without any opportunity for the defendant to answer such information or even know of its existence. (The Administrative Office handbook, *The Presentence Investigation Report*, makes reference to the use of confidential law enforcement records at pp. 4, 5, and 11, but does not consider investigations on which no arrest has been made to be either "essential data" or "optional data" for inclusion in the report.) Thus information contained in the 1964 survey materials could be used by supporters as well as opponents of compulsory disclosure under Rule 32.

The present policy of the Judicial Conference and its committees, including its advisory committees on rules of practice and procedure, which keeps their work from public scrutiny is unwise and should be changed. Since these committees make rules and do not decide individual cases, no invasion of personal privacy is involved. The judicial rule-making process is legislative in form, and the judicial branch should develop a more open information policy which such a form allows and requires.

Historical precedent also supports the policy that committee rule-making should be subject to public examination. The first effort to fashion federal procedural rules through a judicial branch committee was in the writing of the Federal Rules of Civil Procedure from 1935 to 1937. Following the enactment of the Rules, the advisory committee's reporter, Dean and later Judge Charles E. Clark, turned over his complete files of drafts and correspondence to the Yale Law Library in hopes that the written record would be useful to lawyers and legal scholars, as evidence of the committee's intent in drafting particular rules. Clark's action contrasts with the federal judiciary's refusal to release the 1964 survey, and the courts' failure to recognize the value of public disclosure of the work of judicial branch committees.

Rule-making by judicial committee has become increasingly important and controversial. Chief Justice Warren Burger indicated just before assuming his present position that committee rule-making should be more heavily relied on. His managerial initiatives depend in part upon his statutory position as Chairman of the Judicial Conference and his power (subject to Conference approval) to establish Conference committees and appoint committee members. Congressional

refusal to allow the new Federal Rules of Evidence to come into effect on schedule in 1973 marked the first time any rules drafted by a federal judicial committee had been delayed or defeated in Congress. The trend which these events illustrate requires that the judicial branch alter the practice of judicial committee privilege which has become part of the administrative process of the federal court system.

I appreciate the opportunity to bring this matter to the attention of the Subcommittee.

Sincerely,

CARL BAAR,
Visiting Assistant Professor.

Enclosure.

July 16, 1971.

To the Editor:

Now that the federal courts have vindicated the freedom of the press against executive branch claims of secrecy, it may be appropriate for the federal judiciary to turn its attention to historical materials which it has withheld from public scrutiny.

In the summer and fall of 1964, the United States Judicial Conference Committee on the Administration of the Probation System conducted a survey of all federal trial and appellate judges to ascertain their views on a proposed rule for the compulsory disclosure of presentence reports to criminal defendants.

Since the overwhelming majority of defendants in criminal cases plead guilty, the courts' exercise of discretion focuses on the sentence—its length, and whether it is to be served on probation or in jail. The presentence report prepared by a court probation officer is an important element in the sentencing decision. The rules governing disclosure of the reports have been important to judges and to defendants.

The results of the survey—widespread opposition by the judges to compulsory disclosure—may have contributed to the refusal of the Advisory Committee on Criminal Rules of the Judicial Conference to recommend a compulsory disclosure rule in 1966. That committee has recommended such a rule in its 1970 draft proposals now under study.

The survey report, which was duplicated and circulated within the federal judiciary, would provide important insight into the decision-making of the judicial branch on an important public question. Yet the Administrative Office of the United States Courts has refused to make it public. A Yale Law School Research Fellow was told in November of last year that the survey "has always been regarded as confidential and made only for committee guidance." The Yale Law Library was given similar information in March of this year. The Law Librarian of the Library of Congress was also informed at that time that the report was unavailable to the public.

Despite the fact that the judicial branch refuses to release the report, survey findings were cited in the 1968 volume on "Standards relating to Sentencing Alternatives and Procedures" published by the American Bar Association Project on Minimum Standards for Criminal Justice. Federal Judge Edwin M. Stanley used the survey to criticize compulsory disclosure of presentence reports. He then suggested that readers consult the published survey for "other convincing arguments opposing compulsory disclosure." Apparently the judge did not realize that the federal judiciary would not allow the interested public to do so.

The New York Times case opened up important questions of public access to government documents used in making major decisions. While the Court did not require any public agency to disclose documents, it assumed the value of the public's right to know. It placed the burden on the government to show why information could not be made public. It certainly follows from the spirit of the Times case that the judicial branch should reevaluate its own information policies to allow public disclosures of widely circulated materials on which major policy decisions have relied.

Sincerely,

IRIS J. WILDMAN,
Acquisition Librarian,
Yale Law Library.
CARL BAAR,
Russell Sage Fellow,
Yale Law School.

DEPARTMENT OF POLITICAL SCIENCE/THE UNIVERSITY OF MICHIGAN,
Ann Arbor, Mich., May 22, 1973.

Professor ARTHUR S. MILLER,
The National Law Center,
George Washington University,
Washington, D.C.

DEAR PROFESSOR MILLER: Thanks very much for sending copies of correspondence between Senator Ervin and General Kirks on the question of "Judicial Conference privilege." What follows are some comments and reactions to Kirks' letter of April 18.

First, it indicates just how far removed from policy-making the Administrative Office is. Congress always turns to the AO for staff work on legislation, yet on policy matters they are entirely the creature of the Judicial Conference. I am sure the Subcommittee would get a more meaningful response from the Conference itself and the relevant committees, for example from Chief Justice Burger as Conference chairman and Judge Albert Maris as Rules Committee chairman.

Kirks cites publication of Conference proceedings (p.1). This document corresponds roughly to a legislative journal, indicating who made reports and motions, along with the conclusions of a report or the statement of a motion. The debate is neither recorded verbatim, nor summarized. It is not possible to distinguish items subject to vigorous debate from those approved without comment. No votes are recorded, nor do the proceedings indicate whether a formal vote is taken or not.

Reports of Conference committees may be widely circulated among bench and bar, as noted by Kirks (p.2). Although he cites no examples less than nine years old, the circulation of Advisory Committee recommendations and notes on revision of federal rules has taken place at frequent intervals since then. For other committees, however, there appears to be no information policy—i.e. no criteria for determining what types of materials should be made public. Unpublished work papers may be "the property of that group," but when the group in question is a public agency, it has some responsibility for stating the terms and conditions under which the material it generates is available to the public, and doing so in more specific terms than "at the discretion of the committee."

Again, note that the opinion survey on disclosure of presentence reports is not an "unpublished work paper," since it was machine duplicated for circulation outside the committees concerned. I would assume at least a few hundred copies were made, although I have no way of knowing. If a document of this sort can be subsumed within the context of Kirks' discussion, the discretion of Conference committees to withhold information is definitely in excess of what can be rationally justified. Scholars and librarians were not denied access to the survey on the grounds that no more copies were available, but on the grounds that no copies could be made available.

Those judges who labor on the Conference committees would probably be complimented to know that persons in the academic community were interested in their deliberations. It is unlikely that many requests for committee working papers would be made. But this lack of pressure should allow the Conference and its committees time to reflect on the question and come up with an intelligent and workable policy which places emphasis on public access to judicial branch work, giving the judiciary the burden of justifying the withholding of information about its administrative policy-making.

Specifically, the withholding of advisory committee "working files" by Chief Justice Hughes and his successors is given quite inadequate justification by Kirks (p.4). Judge Charles E. Clark, Reporter for the original Civil Rules, placed his correspondence and what is probably the bulk of the working papers (mostly mimeographed) of the first rules committee in the Yale Law School Library for public use explicitly because such material might assist in the interpretation of the rules in future litigation. The Congress, unlike most state legislatures, publishes committee hearings and lengthy committee reports partly as aids in statutory interpretation. Most authorities and practitioners would conclude that the absence of "extrinsic materials" at the state level hinders litigation. (See California State Assembly, Report of the Subcommittee on Legislative Intent, 1963.) Based on my examination of the Clark papers, I believe Kirks is far too modest when he asserts that advisory committee working papers "obviously have no relation to the meaning of the rules as finally adopted." The

federal judiciary's unilateral practice of limiting access to these materials cannot be justified on the grounds presented in Kirks' letter.

I have no disagreement with Kirks' statement of current practices by the Judicial Conference. I do disagree that such practices are justified. He may not choose to use such terminology as "Judicial Conference privilege," but that is peripheral to the fact that the present policies of the Conference restrict the flow of information which cannot be justifiably withheld from the public, without a set of meaningful standards to confine and structure the administrative discretion of the judicial branch of government.

This letter has been delayed by recent moving. After May 27, I can be reached at 21 Gosford Blvd., No. 8, Downsview, Ontario, Canada M3N 2G7. My home phone remains 416-638-1566.

I appreciate your taking up this issue and carrying it through thus far. I hope that judicial administrators will take up the matter and improve their own operations in the federal system.

Best wishes,

CARL BAAR.

EXECUTIVE PRIVILEGE

PART 6—MISCELLANEOUS BACKGROUND

COMPTROLLER OF THE UNITED STATES,

Washington, D.C., April 13, 1973.

B-130961.

Hon. WILLIAM PROXMIRE,
U.S. Senate.

DEAR SENATOR PROXMIRE: In accordance with your request of September 27, 1972, and subsequent discussions with your office, GAO has examined trips taken by the President and his family, the Vice President, White House Staff, and Cabinet officers. It was agreed that our examination would be limited to transportation provided by the 89th Military Airlift Wing, Andrews Air Force Base (AFB), Washington, D.C., during September, October, and the first week of November 1972. It was also agreed that the specific information we would furnish you would be a list of the trips made by those mentioned above and with an indication as to which trips were paid for by the Finance Committee to Re-elect the President and the amount the Committee reimbursed the Government.

From flight records of the 89th Military Airlift Wing, we identified 103 trips made by the White House and the Cabinet officers. We found that the Finance Committee to Re-Elect the President had reimbursed the Government for 23 of the trips. Our examination was restricted to trips made by other than the Presidential pilot and crew because the Presidential crew's flight records were not available to us.

However, information obtained by our Office of Federal Elections showed an additional 32 trips made by the Presidential crew and paid for by the Finance Committee to Re-Elect the President. We could not determine the total number of trips made by the crew during the period under examination.

SUMMARY OF TRIPS MADE BY OTHER THAN PRESIDENTIAL CREW

We identified from flight logs 103 trips made by the 89th Military Airlift Wing for the White House and for Cabinet officers between September 1 and November 7, 1972.

Twenty-six of the trips were made by Cabinet officers, and the costs were paid by the agency involved except in the case of the Secretary of Defense. Eight trips made by Secretary of Defense Laird were charged to the 89th Military Airlift Wing appropriation.

The remaining 77 trips were made for the White House. The flight logs for these trips showed only itinerary data and not the names of passengers. The Finance Committee to Re-Elect the President has reimbursed the Government \$50,355 for 23 of these trips.

Details of the 103 trips, including an indication as to whether costs were paid by the Finance Committee to Re-Elect the President, are included in enclosure I.

TRIPS MADE BY THE PRESIDENTIAL CREW

Our examination of payment documents at the Air Force Finance Office, Bolling AFB, Washington, D.C., and information available at our Office of Federal Elections showed that the Finance Committee to Re-Elect the President had paid \$98,936 for 32 additional White House trips made by the 89th Military Airlift Wing during the period we examined. These trips were not included in the 103 we identified through flight logs on file at Andrews AFB and manifests at Headquarters, Military Airlift Command, Scott AFB, Illinois. We assume that they were made by the Presidential crew and that the pertinent logs and manifests were retained by the Military Assistant to the President. Details of these trips are enclosed as enclosure II.

LIMITATIONS ON AVAILABLE FLIGHT DATA

The 89th Military Airlift Wing is responsible for fulfilling the air transportation requirements of the President and other key Government officials. Air Force officials informed us that the Military Assistant to the President maintain flight log information and manifests for trips made by the Presidential pilot and crew. Flight log information for all other trips flown by the 89th Military Airlift Wing are on file at Andrews AFB.

All flight manifests are maintained at Headquarters, Military Airlift Command, except those pertaining to White House flights. The Military Assistant to the President maintains the manifests for all White House flights, even those not flown by the Presidential crew.

In response to our request for the flight and manifest data, the Counsel to the President said that such records have been traditionally considered personal to the President and thus not subject to inquiry by the Congress.

We trust this information is satisfactory. We will be glad to discuss this matter in detail with you or members of your staff.

Sincerely yours,

ELMER B. STAATS,
Comptroller General of the United States.

ENCLOSURE I

SUMMARY OF TRIPS BY OTHER THAN PRESIDENTIAL CREW FOR WHITE HOUSE AND
CABINET OFFICERS BETWEEN SEPT. 1 AND NOV. 7, 1972

CABINET (26 FLIGHTS)

Date	Agency	Itinerary	Passenger	Cost paid by
Sept. 24	State	Andrews AFB to La Guardia International Airport, N.Y., and return.	Secretary of State	Department of State.
Sept. 29	do	La Guardia International Airport, N.Y., to Andrews AFB.	do	Do.
Oct. 2	do	Andrews AFB to La Guardia International Airport, N.Y., and return.	do	Do.
Oct. 10	do	Andrews AFB to La Guardia International Airport, N.Y.	do	Do.
Oct. 12	do	La Guardia International Airport, N.Y., to Andrews AFB.	do	Do.
Sept. 21	Justice	Andrews AFB to Myrtle Beach AFB, S.C.	Attorney General	Department of Justice.
Sept. 23	do	Myrtle Beach AFB, S.C., to Andrews AFB.	do	Do.
Sept. 6	Labor	Andrews AFB to Sullivan County International Airport, N.Y., and return.	Secretary of Labor	Department of Labor.
Sept. 13	Agriculture	Andrews AFB to Des Moines and Burlington, Iowa, to Mankato, Minn., and return to Andrews AFB.	Secretary of Agriculture	Department of Agriculture.
Oct. 30	do	Andrews AFB to Bloomington, Ill., to Amarillo, Tex., to Albuquerque and Kirkland, N. Mex.	do	Do.
Sept. 1	Treasury	Andrews AFB to Westover AFB, Mass.	Secretary of the Treasury	Department of the Treasury.
Sept. 4	do	Westover AFB, Mass., to Andrews AFB.	do	Do.
Oct. 21	do	Andrews AFB to Ingalls Field, Va., and return.	do	Do.
Oct. 25	do	Andrews AFB to Chicago, Ill.	do	Do.
Oct. 28	do	Chicago, Ill., to Andrews AFB.	do	Do.
Nov. 2	do	Andrews AFB to Logan International Airport, Mass., and return.	do	Do.
Oct. 19	Commerce	Andrews AFB to Tinker AFB, Okla., to Los Angeles, Calif., and return to Andrews AFB.	Secretary of Commerce	Department of Commerce.
Nov. 6 and 7	do	Andrews AFB to Chicago, Ill., and return.	do	Do.
Sept. 5 and 6	Defense	Andrews AFB to Alameda Naval Air Station, Calif., to Knoxville, Tenn., and return to Andrews AFB.	Secretary of Defense	Air Force appropriation for operating the 89th Military Airlift Wing.
Sept. 18 and 19	do	Andrews AFB to Mosinee, Madison, and Stevens Point, Wis., and return to Andrews AFB.	do	Do.
Sept. 22	do	Andrews AFB to Hagerstown, Md., and return.	do	Do.
Sept. 26 and 28	do	Andrews AFB to Tinker AFB, Okla., to Sheppard AFB and Carswell AFB, Tex., to McConnell AFB, Kans., and return to Andrews AFB.	do	Do.
Oct. 13 and 14	do	Andrews AFB to Pensacola, Fla., and return.	do	Do.
Oct. 21 to 23	do	Andrews AFB to East Hartford, Conn., to Quonset Point, R.I., to East Hartford, Conn., and return to Andrews AFB.	do	Do.
Oct. 25 to 31	do	Andrews AFB to London, England; to Rota, Spain; to Norfolk, Va., and return to Andrews AFB.	do	Do.
Nov. 2 and 3	do	Andrews AFB to Oshkosh, Mosinee, and Madison, Wis., and return to Andrews AFB.	do	Do.

WHITE HOUSE (77 FLIGHTS)

Date	Itinerary	Passenger	Cost paid by
Sept. 14	Andrews AFB to Birmingham, Ala., and return	Unknown	Air Force appropriation for operating the 89th Military Airlift Wing.
Sept. 19	Andrews AFB to Montgomery, Ala., and return	do	Do.
Sept. 19 to 21	Andrews AFB to Los Angeles and San Francisco, Calif., and return to Andrews AFB.	do	Do.
Oct. 30 and 31	Andrews AFB to El Toro, Calif., and return	do	Do.
Nov. 3 to 7	Andrews AFB to El Toro and Ontario, Calif., and return to Andrews AFB.	do	Do.
Sept. 12	Andrews AFB to Colorado Springs, Colo., and return	do	Do.
Oct. 22 and 23	Andrews AFB to Homestead AFB, Fla., to Ashland, Ky., and return to Andrews AFB.	do	Do.
Oct. 27 and 28	Andrews AFB to Tristate Airport, W. Va., to Ashland, Ky., to Homestead AFB, Fla., and return to Andrews AFB.	do	Do.
Nov. 7	Andrews AFB to Homestead AFB, Fla., and return	do	Do.
Sept. 29	Andrews AFB to Atlanta, Ga., and return	do	Do.
Oct. 4	do	do	Do.
Oct. 23	Andrews AFB to Chicago, Ill., and return	do	Do.
Oct. 24	Andrews AFB to Ashland, Ky., and return	do	Do.
Oct. 19	Andrews AFB to Detroit, Mich., and return	do	Do.
Sept. 8	Andrews AFB to Selfridge AFB, Mich., and return	do	Do.
Sept. 19	Andrews AFB to Minneapolis, Minn., and return	do	Do.
Sept. 10 and 11	Andrews AFB to Nellis AFB, Nev., and return	do	Do.
Sept. 18	Andrews AFB to Newark, N.J., and return	do	Do.
Nov. 6 and 7	Andrews AFB to Islip, N.Y., and return	do	Do.
Oct. 22 and 23	Andrews AFB to Albuquerque, N. Mex., and return	do	Do.
Sept. 6	Andrews AFB to J.F.K. International Airport, N.Y., to Cleveland, Ohio, and return to Andrews AFB.	do	Do.
Oct. 13 and 14	Andrews AFB to J.F.K. International Airport and Westchester County Airport, N.Y., and return to Andrews AFB.	do	Do.
Sept. 24	Andrews AFB to J.F.K. International Airport, N.Y., and return.	do	Do.
Sept. 8	Andrews AFB to La Guardia International Airport, N.Y., and return.	do	Do.
Sept. 9	do	do	Do.
Sept. 13 and 14	Andrews AFB to La Guardia International Airport, N.Y., and return.	Vice President	Do.
Sept. 17	Andrews AFB to Dulles International Airport, Va., to La Guardia International Airport, N.Y., and return to Andrews AFB.	Unknown	Do.
Sept. 19	Andrews AFB to La Guardia International Airport, N.Y., and return.	do	Do.
Sept. 20	Andrews AFB to La Guardia International Airport, N.Y., and return	do	Do.
Sept. 26	do	do	Do.
Sept. 25	do	do	Do.
Sept. 28	do	do	Do.
Sept. 30	do	do	Do.
Sept. 30	do	do	Do.
Oct. 3	Andrews AFB to La Guardia International Airport, N.Y., and return.	Dr. Henry Kissinger.	Do.
Sept. 28 and 29	Andrews AFB to La Guardia International Airport, N.Y., to Johnson City, Tex., and return to Andrews AFB.	Unknown	Do.
Oct. 24 and 25	Andrews AFB to La Guardia International Airport, N.Y., and return.	do	Do.
Nov 3 and 4	do	do	Do.
Oct. 13	Andrews AFB to Youngstown and Cleveland, Ohio, and return to Andrews AFB.	do	Do.
Oct. 27	Andrews AFB to Cleveland, Ohio, and return	do	Do.
Oct. 16	Andrews AFB to Philadelphia, Pa., and return	do	Do.
Sept. 13	Andrews AFB to Philadelphia and Pittsburgh, Pa., and return to Andrews AFB.	do	Do.
Sept. 15	Andrews AFB to Wilkes Barre, Pa., and return	do	Do.
Sept. 5 and 6	Andrews AFB to Beaufort, S.C., and return	do	Do.
Oct. 6 and 7	Andrews AFB to Ellsworth AFB, S. Dak., to Seattle, Wash., and return to Andrews AFB.	do	Do.
Oct. 9 and 10	do	do	Do.
Sept. 14	Andrews AFB to McGhee-Tyson Field, Tenn., and return.	do	Do.
Sept. 22 and 23	Andrews AFB to Harlingen AFB and Randolph AFB, Tex., and return to Andrews AFB.	do	Do.
Oct. 26 and 27	Andrews AFB to Charleston and Huntington, W. Va., and return to Andrews AFB.	do	Do.
Oct. 19	Andrews AFB to Hot Springs, W. Va., and return	do	Do.
Oct. 21	do	do	Do.
Oct. 26	Andrews AFB to Huntington, W. Va., to Ashland, Ky., and return to Andrews AFB.	do	Do.
Oct. 27	Andrews AFB to TriState Airport, W. Va., and return	do	Do.
Oct. 11	Andrews AFB to Atlantic City, N.J., and return	do	Do.

WHITE HOUSE (77 FLIGHTS)—Continued

Date	Itinerary	Passenger	Cost paid by Finance Committee to Reelect the President
Sept. 13.....	Andrews AFB to Philadelphia and Pittsburgh, Pa., to Andrews AFB.	Mr. Robert Finch.....	\$1,124.51
Sept. 18 to 20.....	Andrews AFB to Billings and Yellowstone, Mont., and Idaho Falls, Idaho, to Andrews AFB.	Unknown.....	10,875.08
Sept. 18 to 21.....	do.....	do.....	
Oct. 23.....	Andrews AFB to Lockbourne, Ohio, and return.....	President's family.....	1,025.68
Oct. 27.....	Andrews AFB to Shreveport, La., to Gulfport, Miss., to Keesler AFB, Miss., to Minneapolis, Minn., and return to Andrews AFB.	do.....	5,333.54
Oct. 28.....	Andrews AFB to Detroit, Mich., and return.....	do.....	1,179.54
Sept. 14.....	Andrews AFB to Trenton, N.J., and return.....	do.....	564.13
Sept. 5.....	Andrews AFB to Mayport Naval Air Station, Fla., and return.	do.....	769.26
Sept. 8.....	Andrews AFB to Chicago, Ill., and return.....	do.....	72.00
Sept. 10.....	Andrews AFB to Cleveland, Ohio, and return.....	do.....	1,538.52
Sept. 11.....	Andrews AFB to La Guardia International Airport, N.Y., and return.	do.....	1,025.68
Sept. 12.....	Andrews AFB to Nashville, Tenn., and return.....	President's family.....	532.84
Sept. 28 and 29.....	Andrews AFB to Birmingham, Ala., to Craig AFB, Ala., to Little Rock, Ark., to Raleigh-Durham, N.C., and return to Andrews AFB.	do.....	1,384.68
Oct. 1.....	Andrews AFB to Milwaukee, Wis., and return.....	do.....	2,923.18
Oct. 4.....	Andrews AFB to Indianapolis, Ind., and return.....	do.....	1,641.08
Oct. 5.....	Andrews AFB to Richards-Gebaur AFB, Mo.; to Los Angeles, El Toro, and Ontario, Calif., to Cleveland, Ohio, and return to Andrews AFB.	do.....	1,435.95
Oct. 6.....	Andrews AFB to Westchester County Airport, N.Y., to Montpelier, Vt., to Berlin, N.H., and return to Andrews AFB.	do.....	6,154.08
Oct. 18.....	Andrews AFB to Columbia and Myrtle Beach, S.C., and return to Andrews AFB.	do.....	1,791.68
Oct. 23.....	Andrews AFB to Offutt AFB, Nebr., to Medford, Oreg., to McClellan AFB, Calif., and return to Andrews AFB.	do.....	1,384.67
Oct. 26.....	Andrews AFB to Huntington, W. Va., to Ashland, Ky., and return to Andrews AFB.	do.....	6,820.77
Nov. 6.....	Andrews AFB to La Guardia International Airport and MacArthur Airport, N.Y., and return to Andrews AFB.	do.....	1,208.34
Nov. 7.....	Andrews AFB to MacArthur Airport, N.Y., and return.....	do.....	666.69
Nov. 4.....	Harrisburg, Pa., to Willow Grove, Pa.	do.....	410.27
Total.....			512.84
			¹ 50,355.00

¹ 23 flights paid by Finance Committee to Reelect the President.

ENCLOSURE-II

WHITE HOUSE TRIPS BY THE PRESIDENTIAL CREW BETWEEN SEPT. 1 AND NOV. 7, 1972, FOR WHICH THE COST WAS PAID BY THE FINANCE COMMITTEE TO RE-ELECT THE PRESIDENT

Date	Itinerary	Passenger	Amount of reimbursement
Sept. 22 and 23	Andrews AFB to Laredo, Harlingen, and San Antonio, Tex., and return to Andrews AFB.	President Nixon and staff.	\$8, 283. 68
Sept. 18 to 20	Andrews AFB to Chicago, Ill., to Billings, Mont., to Idaho Falls, Idaho, to Moffet Field, Calif., to San Antonio, Tex., to Oklahoma City, Okla., and return to Andrews AFB.	President's family	16, 794. 30
Sept. 23	Andrews AFB to Chicago, Ill., and return	do	1, 641. 09
Sept. 26	Andrews AFB to Kansas City, Kans., to Stapleton and McCarren, Calif., to Phoenix, Ariz., to Santa Fe and Carlsbad, N. Mex., and return to Andrews AFB.	do	5, 846. 38
Oct. 24	Andrews AFB to Morgantown, W. Va., and return	do	669. 69
Oct. 30	Andrews AFB to Syracuse and Buffalo, N.Y., and return to Andrews AFB.	do	1, 338. 83
Do	Andrews AFB to Wausau, Wis., and return	do	1, 948. 79
Sept. 7	Andrews AFB to La Guardia International Airport, N.Y., and return.	do	820. 54
Do	Andrews AFB to Willow Grove, Pa., and return	do	512. 84
Sept. 10	Andrews AFB to La Guardia International Airport, N.Y., and return.	do	461. 55
Sept. 12	Andrews AFB to St. Louis, Mo., to Cleveland and Port Columbus, Ohio, and return to Andrews AFB.	do	2, 410. 34
Sept. 16	Andrews AFB to Port Columbus, Ohio, and return	do	1, 025. 68
Do	Andrews AFB to Philadelphia, Pa., and return	do	615. 39
Sept. 21 and 22	Andrews AFB to Bismarck and Fargo, N. Dak., to Sioux Falls, S. Dak., and return to Andrews AFB.	do	3, 589. 88
Sept. 15	Andrews AFB to Morristown, Pa., and return	do	410. 27
Sept. 16	Andrews AFB to La Guardia International Airport, N.Y., and return.	do	353. 99
Sept. 26 to 28	Andrews AFB to Newark, N.J., to Oakland and Los Angeles, Calif., and return to Andrews AFB.	President Nixon	11, 574. 45
Oct. 9	Andrews AFB to La Guardia International Airport, N.Y., and return.	President's family	769. 26
Oct. 13	Andrews AFB to Quincy, Ill., to Kansas City, Kans., to Wheeling, W. Va., to Hagerstown, Md., and return to Andrews AFB.	do	2, 666. 76
Oct. 4 and 5	Andrews AFB to Harrisburg, Pa., to La Guardia International Airport, N.Y., and return to Andrews AFB.	do	1, 025. 68
Oct. 15	Andrews AFB to Buffalo, N.Y., and return	do	1, 025. 68
Oct. 19	Andrews AFB to Detroit and Wayne, Mich., and return to Andrews AFB.	do	1, 179. 53
Oct. 31 and Nov. 1	Andrews AFB to Lawrence G. Hanscom Field, Mass., and return.	do	1, 025. 68
Oct. 10	Andrews AFB to J.F.K. International Airport, N.Y., and return.	do	36. 00
Oct. 12	Andrews AFB to Atlanta, Ga., and return	President Nixon	2, 723. 40
Oct. 23	Andrews AFB to Westchester County and MacArthur Airports, N.Y., and return to Andrews AFB.	do	1, 929. 08
Oct. 28	Andrews AFB to Cleveland, Ohio, to Saginaw, Mich., and return to Andrews AFB.	do	3, 971. 63
Nov. 3	Andrews AFB to Chicago, Ill., to Tulsa, Okla., to Providence, R.I., and return to Andrews AFB.	do	8, 510. 63
Nov. 2	Andrews AFB to Grand Rapids, Mich., to Chicago, Ill., and return to Andrews AFB.	President's family	1, 794. 94
Nov. 4	Andrews AFB to Greensboro, N.C., to Albuquerque, N. Mex., to Ontario and El Toro, Calif., and return to Andrews AFB.	President Nixon	11, 687. 93
Sept. 1	El Toro, Calif., to Seattle, Wash., and return	President's family	2, 256. 50
Oct. 21	J.F.K. International Airport, N.Y., to Andrews AFB	do	36. 00
Total			1 98, 936. 44

¹ 32 flights.

MOLLENHOFF EXHIBIT A

WASHINGTON, D.C., May 8, 1973.

Senator JAMES O. EASTLAND,
Chairman, Judiciary Committee,
U.S. Senate.

DEAR MR. CHAIRMAN: The name of Mr. Elliot L. Richardson has been referred to your Committee for action in connection with his nomination to be Attorney General of the United States.

A great deal of evidence is available which suggests strongly that Mr. Richardson is not fit for this high office and not worthy of the extraordinary trust which must be accorded to the Attorney General at this point in our history.

So that you and your Committee can discharge your Constitutional duties with the benefit of all available information, I request permission to present evidence to you, in a formal way, which I believe might not otherwise be made available to you.

Mr. Richardson has had responsibility for other investigations in this administration similar to the one he is now expected to conduct. He has proved himself inadequate and unfit to conduct such inquiries. Under his management in the Department of State, for example, there have been systematic violations of the laws and regulations of the United States. Pledged to restore good administration to the Department of State, under Mr. Richardson the situation actually deteriorated. Cover-ups, fraud, violations of employee rights, perjury, and other illegal actions were tolerated by Mr. Richardson when Under Secretary of State.

Instead of a cleanup, supportive of good government, Mr. Richardson permitted coverups, in direct violation of his oath of office.

His short three-month record at the Department of Defense also is marred by at least one illegal act of reprisal known to Mr. Richardson personally who must have authorized it. Two articles by the respected journalists Clark Mollenhoff and Allan Brownfeld (attached) will serve to illustrate this point. In fact, Mr. Richardson may well provide a textbook example of the administrator who talks reform while actually engaging in coverup.

Articulate and clever, and a man who carefully chooses his words, Mr. Richardson's record is synonymous with coverup.

You are familiar, I know, with the Otepka matter at the Department of State. When Mr. Richardson was in the number two spot at the Department of State, he had an affirmative duty to look into the hard evidence of perjury, wiretaps, falsification of records, and other illegalities. He failed to do this and, in most cases, those guilty of wrongful acts were actually promoted.

I will pass over the fact that Mr. Richardson's judgement is not always sound. (His decision to give away naval nuclear propulsion technology, against Admiral Rickover's best advice, had to be overruled by President Nixon himself.) Similarly, one can probably overlook the fact that HIEW, which he headed for a number of years is hardly a model Department of the U.S. Government.

In the light of today's events, Mr. Chairman, one cannot overlook the fact that Mr. Richardson's record for conducting investigations that produce results has been a miserable failure. From my personal experience in the Department of State and the Department of Defense I can provide some excellent examples.

In the expectation that you may wish me to provide your Committee with my testimony, I shall accommodate my schedule to meet your needs in any way possible. Your staff aides can contact me at the above address or telephone me at 244-5085 or 244-4819.

Sincerely yours,

JOHN D. HEMENWAY.

Enclosures: Clark R. Mollenhoff's syndicated "Washington Watch": Richardson Persists in attempt to Fire Expert. *Richmond Times* and *Dallas Morning News* versions. Allan C. Brownfield in *Roll Calls* Bureaucrats: Their Own Biased Judge and Jury.

MOLLENHOFF EXHIBIT B

[From the Dallas Morning News, Apr. 14, 1973]

FOREIGN AFFAIRS EXPERT BUCKS BRASS

WASHINGTON.—By all odds, John D. Hemenway is the kind of a bright and hardworking foreign affairs expert who should be moving forward in the Nixon administration.

Instead, this 46-year-old Rhodes scholar with fluency in Russian and German, is on the way out because he is persona non grata with Elliot L. Richardson, the new U.S. Secretary of Defense.

The first attempt at firing Hemenway was made for Richardson even before he was confirmed as Defense secretary, through his alter ego, Jonathan Moore who had preceded Richardson from the Department of Health, Education, and Welfare (HEW) to Defense. Moore's job was to eliminate men who were on former Defense Secretary Melvin Laird's team.

Many of Laird's men bowed out voluntarily because they didn't want to serve under Richardson. But Hemenway wanted to remain as a confidential assistant in the international security affairs division for Europe where he had served since 1969.

Moore bungled the first attempt at firing Hemenway in January, and missed again since then. However, the third effort to fire Hemenway may be done in such a way that it will not be vulnerable to the charges of irregularities that made the first two attempts fail.

One might rightly ask what Hemenway, a bright Republican conservative foreign affairs expert, has done to merit such special attention from Secretary Richardson and his personnel expert, Jonathan Moore.

FOUGHT FOR RIGHTS

The answer is that Hemenway has fought vigorously for his rights to a State Department job as a career foreign service officer from which he was being "selected out" (discharged) by the Johnson administration in its last days in office.

In the first weeks that Richardson was under secretary of state in 1969, Hemenway's appeal from the "selection out" routinely fell under Richardson's authority. Richardson and Moore, who was his man Friday on such matters at the State Department in those days, gave the case to the same personnel division that Hemenway contended was involved in lying, falsifying records and otherwise illegally trying to fire him.

Richardson and Secretary of State William P. Rogers then rubber-stamped the personnel division's finding that it had acted properly in selecting the Hemenway out.

Defense Secretary Laird and Asst. Secretary Warren Nutter recognized Hemenway for the bright and capable foreign service expert that he was and hired him at essentially the same level in the international securities affairs division.

But, Hemenway still had career job rights at the State Department and he pursued these to force the first grievance hearing in history. In filing that action with the Civil Service Commission, Hemenway challenged the judgment of Under Secretary of State Richardson.

In one of the most painful and drawn out proceedings in the history of the State Department, Hemenway proved that top personnel officials in the State Department had sworn to false records.

The 3-man hearing panel that heard the Hemenway case in effect found for him on all counts and ruled he should be reinstated, promoted, have his legal fees paid, receive an apology and that letters of retraction be sent to those who had been officially misinformed about the Hemenway case by the State Department press office and personnel office.

The 3-man panel also ruled that Hemenway's records should be expunged of the untruthful and derogatory material the personnel division had wrongfully placed in his file.

The decision meant that Under Secretary Richardson and his special assistant Moore had been wrong and has incorrectly advised the secretary of state. It also branded them as having major responsibility for a grave injustice.

However, the State Department simply set aside the hearing decision and refused to implement any of the recommendations favorable to Hemenway. There were letters of protest filed for Hemenway by both the most conservative and most liberal congressmen and senators including liberal Democrat William Proxmire of Wisconsin and Republican Strom Thurmond, and ultraconservative from South Carolina. Sen. Henry M. Jackson, a moderately liberal Democrat from Washington, also spoke for Hemenway.

Under Secretary John Irwin finally agreed to a half-hearted apology to Hemenway and to pay his legal fees. But he refused to reinstate him as a foreign service officer and then left for Paris where he is now serving as U.S. ambassador.

IMPRESSIVE RECORD

It is doubtful if any of those who have taken part in the elimination of Hemenway from State and Defense can match his record as an honor graduate from the U.S. Naval Academy in 1951 with a B.S. in engineering; a B.A. degree in politics, philosophy and economics, from the University of Oxford in 1954; and a masters degree from Oxford in international studies in 1956.

The Milwaukee, Wis., native is fluent in Russian and German and served in Moscow and in Berlin in years as a career foreign service officer between 1954 and 1969.

Hemenway enlisted in the Army as a private at 17 in World War II and at 18 was commissioned a second lieutenant on the battlefield before returning to the Naval Academy in 1947.

John Hemenway is a man who has proven he will stand out in any crowd. Yet, the Nixon Administration blundered early by going along with the foreign service crowd from Democratic administrations that used provable foul means to fire capable, but independent, conservatives who occasionally dissented but usually proved they were right.

If there are too few bright conservatives in the State department, Elliot Richardson has a large measure of the responsibility. If the few bright conservatives who survived under Defense Secretary Laird are being eliminated, it is the direct responsibility of Richardson. If it is permitted to continue, President Nixon cannot avoid a measure of responsibility when both liberals and conservatives in Congress have joined in protest.

MOLLENHOFF EXHIBIT C

[From the Richmond Times-Dispatch, Apr. 15, 1973]

WASHINGTON WATCH—RICHARDSON PERSISTS IN ATTEMPT TO FIRE EXPERT

(By Clark R. Mollenhoff)

WASHINGTON.—By all odds, John D. Hemenway is the kind of bright and hard working foreign affairs expert who should be moving forward in the Nixon administration.

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Many of Laird's men bowed out voluntarily because they didn't want to serve under Richardson. But Hemenway wanted to remain as a confidential assistant in the International Security Affairs Division for Europe, in which he had served since 1969.

Moore bungled the first attempt at firing Hemenway in January, and has missed again since then. However, a third effort to fire Hemenway may be made in such a way that it will not be vulnerable to charges of irregularities that made the first two attempts fail.

One might rightly ask what Hemenway, a bright Republican conservative foreign affairs expert, has done to merit such special attention from Richardson and his personnel expert.

The answer is that Hemenway has fought vigorously for his rights to a State Department job as a career Foreign Service officer, from which he was "selected out" (discharged) by the Johnson administration in its last days in office.

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Undersecretary John Irwin finally agreed to a half-hearted apology to Hemenway and to pay his legal fees. But he refused to reinstate him as a Foreign Service officer and then left for Paris, where he is now serving as U.S. ambassador.

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MOLLENHOFF EXHIBIT D

[From Roll Call, Mar. 1, 1973]

BUREAUCRATS: THEIR OWN BIASED JUDGE AND JURY

(By Allan C. Brownfeld)

Recently, two employees of the federal government were removed from their positions. The reason for their removal remains obscure, but one thing is certain. They were not removed for incompetence. If men and women were removed from government service for incompetence, after all, the mail might arrive on time, criminals might be caught, and other functions of government might be performed at least with reasonable dispatch.

John D. Hemenway was removed from his position at the Department of State and A. Ernest Fitzgerald was removed from his position with the Air Force, it seems, because they did their jobs too well, and made their superiors suspicious

because they would not adopt the maxim which seems the byword of bureaucrats, as well as legislators: "To get along, go along." John Hemenway and Ernest Fitzgerald would not "go along." Now they are gone.

Fitzgerald is the Air Force cost analyst who told Congress about the \$2 billion in cost overruns on the Lockheed C-5A cargo plane, and was subsequently fired from his \$33,000 a year job. The Pentagon insists that Fitzgerald's testimony had nothing to do with his firing, which was "merely a reduction in force."

A reporter asked President Nixon about the Fitzgerald case on January 31, and the President replied: "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. . . . No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and stick by it."

The President's surprisingly frank reply was, of course, retracted the next day. White House Press Secretary Ron Ziegler told reporters that the President had "misspoken." He had been thinking about someone else, Ziegler said, but did not say about whom.

Perhaps the President was thinking of John Hemenway, a former Rhodes Scholar who had been deeply involved in the Berlin problem during the mid-1960s and, at that time, had strong differences of opinion with his superiors. For his efforts, Hemenway was "selected out" of the Department.

When Hemenway charged that his own hard-line anti-Communist philosophy was the real reason for his "selection out" he was given a special grievance hearing—the first in the history of the Foreign Service. The grievance committee was composed of three Foreign Service Officers—one picked by Hemenway, one picked by the State Department and a chairman acceptable to both.

The committee wrestled with the problem for three years and finally in September, 1972, recommended that Hemenway be reinstated in the Foreign Service, promoted, tendered an official apology, and reimbursed for his legal expenses.

Hemenway, however, has not been reinstated. Instead, he has been dismissed from the Defense Department job he was given while the case was being considered. When Secretary of Defense Eliot Richardson was asked about Hemenway's removal at a press conference, he said he knew nothing about it. He may have been right. If he was, however, someone must know something about it. No one, however, is talking.

In Hemenway's view, the Foreign Service is an "old boy" network where the rules are kept deliberately vague and constantly changed in order to accommodate favorites, but ruthlessly applied to get rid of people who make waves.

A 1968 inter-office memo to then-Director of Personnel Howard Mace from his subordinate Donald Trice reveals what the State Department thought of Hemenway. Rather than criticizing his ability, his hard work, and his creditable performance, Trice wrote that Hemenway was destined to end up being "a pain in someone's bippie," and that the reason Hemenway had not been promoted despite his good performance was that Hemenway was "confident to the point of being arrogant and aggressive in a manner that approaches rudeness." Rhetoric aside, that may simply mean that Hemenway's defense of positions he considered in the best national interest simply struck Trice as something the Department of State could do nicely without.

The unbelievable part of the Hemenway case is that the State Department's own committee urged his reinstatement, the Department apologized for treating him unfairly—but refused to reinstate him anyway.

Senator William Proxmire has seen a close analogy between the Hemenway and Fitzgerald cases. These cases demonstrate, he noted, "that there is little room in the Government service for men of character, independence and guts . . . that the Government doesn't want the free spirits—the highly intelligent, strong minded, truthful men—working for it. What it wants instead are time-servers, conformists and yes' men."

Bureaucrats, at this time, are their own judge and jury. Men such as John Hemenway and Ernest Fitzgerald make "waves," they criticize the judgment of their superiors, they believe that the public interest is more important than the self-interest of the bureaucracy. What to do with men like this is simple: remove them.

Speaking of his ten years in the Departments of Commerce and Labor, Arnold Bennett stated that, "There is a fantastic effort to keep criticism off the record. You can't admit error. It's just not done. You can't ever talk freely about what you really do—that would be a direct threat to the agency's appropriations and to everybody there. And you can't really have your name on anything controversial."

Congress is largely responsible for the state of affairs in which bureaucrats have become a law unto themselves. Harold Seidman, who spent 25 years observing the bureaucracy from the Bureau of the Budget, has written a book called *Politics, Position and Power*, in which he says the bureaucratic bodies provide examples of how Congress transfers its own overlapping powers to the Executive branch.

He notes that, "When jurisdictional problems could not be resolved, the Congress in 1966 created two agencies—the National Highway Safety Agency and the National Traffic Agency—to administer the highway safety program. The President was authorized to designate a single individual to head both agencies—where only one was needed—was to give two Senate committees a voice in the confirmation of the agency head."

Consider the United States Travel Service, a Commerce Department program funded over the years at between \$3.5 and \$4.5 million. It is designed to attract foreigners to vacation in the United States. "We did a study of the Travel Service," said Fred Simpich, general counsel of the Commerce Department in the last year of the Johnson Administration, "which showed that it had a zero effect on the travel patterns of Europeans . . . If the economy is good, they come to the United States. If not, they don't." Bureaucrats never admit that their programs accomplish nothing, but cost a great deal. Any bureaucrat that did would go the way of John Hemenway and Ernest Fitzgerald, and men at the highest levels would not say a word in their defense.

A bill to take the entire grievance procedure out of the hands of the State Department, to cite one possible approach to the problem, passed the entire Senate, only to die in the House Foreign Affairs Subcommittee. Perhaps the House will see fit to consider this legislation again this year.

Bureaucrats can no more judge themselves and be their own jury than can any other branch of government. Men who speak out in behalf of the public interest—such as John Hemenway and Ernest Fitzgerald—are ruthlessly eliminated. Congressmen seem unconcerned with this problem, and when they wonder why government is as sluggish, expensive, and incompetent as it is, they may discover that it is their own fault for not policing and controlling it. In the meantime, John Hemenway and Ernest Fitzgerald are unemployed, and no one seems to care.

MOLLENHOFF EXHIBIT E

[From Roll Call, Mar. 22, 1973]

How "PRIVILEGED" IS THE EXECUTIVE?

(By Allan C. Brownfeld)

The controversy concerning the President's broad claim of executive privilege" with regard to preventing White House attorney John W. Dean III from testifying concerning his role in the Watergate affair, is only another skirmish in the larger battle over the reassertion of Congressional authority. The real issue is whether the elected representatives of the people will function as the primary branch of government, or whether they will be permitted to work only at the sufferance of nonelected officials and bureaucrats.

Consider the reasons for calling attorney Dean to testify. During its hearings concerning President Nixon's nominee for the post of F.B.I. Director, the Senate Judiciary Committee learned that Mr. Gray had supplied memorandums and raw F.B.I. files on the Watergate investigation requested by Mr. Dean. It also became known that the same Mr. Dean had obtained a high-paying job on the Nixon campaign staff for G. Gordon Liddy, who was convicted of conspiring to bug the Democratic headquarters. In addition, E. Howard Hunt, Jr., a former White House consultant who pleaded guilty in the Watergate trial, had turned to Mr. Dean for legal assistance after the June 17 break-in.

The files were sent to Mr. Dean allegedly because he was investigating the Watergate affair for the President. As a result, Gray gave Dean a transcript of interviews that the F.B.I. had with Donald H. Segretti, the California lawyer who was cited in F.B.I. reports as having been hired by the Nixon Committee to try to disrupt the campaigns of Democratic candidates. It has been charged that Dean showed Segretti the transcripts the F.B.I. had forwarded to him, Dean denies this.

It seems clear that John W. Dean III is deeply involved in the whole Watergate affair. It seems equally clear that any Congressional investigation of that affair, and any consideration of the qualifications of Mr. Gray to head the F.B.I., should be conducted with all thoroughness—with an intention to learn what really has been going on in the White House and in the F.B.I. under Mr. Gray's leadership.

The White House, however, rejects such a thorough investigation. It has taken the Fifth Amendment, and has called it "Executive privilege." Thus, the President says that Mr. Dean will not be permitted to testify. Why? Because he works for the President. That, Mr. Nixon seems to feel, is enough. This contradicts an earlier statement by the President that he would not use "executive privilege" to prevent "embarrassing" information from being made available to Congress.

What is the alleged doctrine of "executive privilege"?

First of all, this concept is nowhere mentioned in the Constitution. It was first exercised by George Washington in 1796 when he rejected the House's request for documents relating to the Jay Treaty with Great Britain. Since the House lacked the constitutional authority to pass on treaties, "a just regard to the Constitution and to the duty of my office . . . forbids a compliance with your request," he told the House. But President Washington did not invoke "executive privilege." He declared, instead, that foreign policy questions were proper matters for the Senate, not the House. It is stretching the facts a good deal to trace current claims of "executive privilege" to the colonial period. It just cannot be done.

Mr. Nixon, however, is only following a long line of executives in claiming such "privilege." Presidents Jefferson, Monroe, Polk, Fillmore, Lincoln, Grant, Hayes, Cleveland, Theodore Roosevelt and Coolidge used it once each, Tyler and Hoover used it twice, Jackson three times and Franklin Roosevelt six times. Mr. Nixon has already used "executive privilege" to keep information from the Congress at least eleven times.

The Dean case may not even be the most outrageous, although it is surely high on the list. Consider the case of A. Ernest Fitzgerald, the man who blew the whistle on cost overruns of \$2 billion in the C-5A transport program and lost his job as a result. Recently journalist Clark Mollenhoff, a former special counsel to President Nixon, rejected the Administrations' broad claims of immunity to questioning and said that he will testify in behalf of Fitzgerald who, he states, has been "brutally mistreated by his government."

Mollenhoff said that executive privilege is being used to cloak an "unconscionable Air Force cover-up" in the Fitzgerald case. He declared that this doctrine as asserted by Mr. Nixon is a "disservice" most of all to the President because "he is usually the one most in the dark about the petty and dishonest activities of his subordinates who control the flow of information to the President."

President Nixon himself has acted in an unusual manner concerning Ernest Fitzgerald. In reply to a question from Mollenhoff at a press conference on Jan. 30, the President repudiated the consistent Air Force contention that an economy cutback forced * * * was a decision that was submitted to me, I made it and I stick by it." The next day, however, Presidential Press Secretary Ronald Ziegler said that Mr. Nixon realized on reading the conference transcript that he "misspoke."

Even if George Washington had set the precedent for the kind of "executive privilege" to which we are being subjected, it is interesting to remember that he had only a handful of advisers. Today the White House staff is itself a growing bureaucracy. Henry Kissinger, who appears to be far more important in the determination of foreign policy decisions than the "official" Secretary of State, Mr. Rogers, is prevented from testifying before the Congress. Only Mr. Rogers is sent to Capitol Hill, while Kissinger is sent to Peking, Moscow, and Hanoi. How can Congress do its job if it is prevented from finding out what is really going on in foreign affairs?

President Nixon himself has declared that the use of the executive privilege doctrine should be decided on a "case by case" basis. Why, then, is it being used to prevent John Dean from testifying? The case at hand involves present and former intimates of the President in allegations, many proved in court, of illegal wiretapping, burglary, other campaign sabotage, and of a secret fund. How can the "public interest" be harmed by having these men give sworn testimony about what they know about or did in the Watergate affair? "Executive privilege," after all, is supposedly meant to protect the public interest, not the private misdeeds of men in public office.

The President has said that what is at stake is not only that his advisers not be inhibited in giving him confidential advice "but the integrity of the decision-making process at the very highest levels of government." What is really at stake in the Dean case seems to be something far different. It is not the integrity of the "decision making process" but, rather, the integrity of the decision makers themselves.

The case before us will be an important step forward in the reassertion of legitimate congressional authority—if the Congress is willing to act. The President has declared that he welcomed a court test over the "executive privilege" doctrine, that he would rather see Mr. Gray's nomination defeated than to allow Dean to reveal facts concerning the Watergate incident.

Congress should rise to the challenge. If it does not, it will only see its authority further eroded in the future.

CORRESPONDENCE BETWEEN SENATORS ERVIN AND MUSKIE AND
MR. ROY ASH

MARCH 13, 1973.

Hon. ROY L. ASH,
Director, Office of Management and Budget,
Washington, D.C.

DEAR MR. ASH: The Senate Subcommittee on Separation of Powers of the Committee on the Judiciary, jointly with the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, will hold hearings on *Executive Privilege and Government Secrecy*, on April 10, 11 and 12, 1973. These hearings, in effect, are a continuation of hearings on *Executive Privilege: the Withholding of Information by the Executive* held by the Subcommittee on Separation of Powers in July and August 1971.

We are writing to request that you personally testify at these hearings on April 12, 1973, concerning Congressional and public access to official information. The subject is dealt with in S. 858, introduced by Senator Fulbright, S.J. Res. 72, introduced by Senator Ervin and S. 1142, introduced by Senator Muskie. Copies of these bills are enclosed. We also request you to submit at least one day before your appearance copies of the written statement or statements you prepare for inclusion in the hearing record.

Rufus L. Edmisten, Chief Counsel and Staff Director of the Subcommittee on Separation of Powers (9225-4434), and Alfred Friendly, Jr., Counsel of the Subcommittee on Intergovernmental Relations (225-4718), will be pleased to furnish additional information.

The hearings will be in Room 2228 Dirksen Building, and will begin at 10 o'clock in the morning on April 12.

Sincerely,

SAM J. ERVIN, JR.
Chairman, Subcommittee on Separation of Powers,
Committee on the Judiciary,
EDMUND S. MUSKIE,

Chairman, Subcommittee on Intergovernmental Relations,
Committee on Government Operations.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., March 27, 1973.

Hon. EDMUND S. MUSKIE,
Chairman, Subcommittee on Intergovernmental Relations, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request, made with Senator Ervin, that I testify before a joint session of your Subcommittees on "Executive Privilege and Government Secrecy."

We understand that at your request, the Department of Justice will present testimony during these hearings on the legal ramifications of the proposed legislation under consideration by your Subcommittees. It is most appropriate for that Department to present the views of the Administration, since the questions raised by the subjects of executive privilege and freedom of information are essentially legal in nature.

While I appreciate your affording me the opportunity to testify, I believe that there is nothing of real substance which I could add to the testimony you will receive from the Department of Justice. For this reason, I believe it would be more constructive for me to defer to that Department on this matter.

One comment, however, is appropriate. As you know, the President reaffirmed on March 12, 1973, his original statement of March 24, 1969, that "the policy of this Administration is to comply to the fullest extent possible with Congressional requests for information." The Office of Management and Budget will continue to be guided by this statement of policy in working with the Congress.

Sincerely,

ROY L. ASH, *Director.*

MARCH 29, 1973.

Hon. ROY L. ASH,
*Director, Office of Management and Budget,
The White House, Washington, D.C.*

DEAR MR. ASH: Your letter of March 27, declining our request that you personally testify on the issues of executive privilege and government secrecy is an unacceptable response to the joint invitation of the Subcommittee on Separation of Powers and the Subcommittee on Intergovernmental Relations. It is particularly surprising in view of the conversations between the Subcommittee staff and your liaison officer, Mr. Eberle, and the verbal assurance you personally gave Mr. Rufus Edmisten of your willingness to appear.

Your view that the questions of freedom of information are "essentially legal in nature" is in error. The scope of our hearings goes far beyond narrow legal arguments into the policies and practices which govern both the gathering and the dissemination of official information. The Office of Management and Budget, of course, plays a crucial role in determining such policies, those which affect Congressional access to information about the budget itself but also the procedures which control public access to all official information. We therefore regard your testimony as vital to our inquiry.

You will certainly recall your discussion with us February 7 on the subject of the availability of budgetary information to the Congress. At that time you cited the 1921 Budget and Accounting Act as giving you authority to withhold certain information from the Congress. The subsequent discussion of your position touched on arguments of executive privilege as well and concluded with a direct request from Senator Muskie that you return to explore the subject at the hearings on Executive Privilege and Government Secrecy.

In view of that exchange and in view of the important role your office plays in the flow of official information, we most forcefully reconfirm our invitation of March 16 and our request that you appear personally to testify. As Mr. Eberle informed us that an appearance by you April 11, instead of 12 as we originally suggested, presented no scheduling conflict, we await prompt confirmation of your intention to appear on that day.

Sincerely,

SAM J. ERVIN, Jr.,
*Chairman, Subcommittee on Separation of Powers,
Committee on the Judiciary.*

EDMUND S. MUSKIE,
*Chairman, Subcommittee on Intergovernmental Relations,
Committee on Government Operations.*

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., April 4, 1973.

Hon. EDMUND S. MUSKIE,
Chairman, Subcommittee on Intergovernmental Relations, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I sincerely regret that you and Senator Ervin consider my response to your request for my testimony before your Subcommittee unacceptable. To begin with, there has obviously been an inadvertent misunderstanding regarding a commitment on my part. Mr. Eberle informs me that he did not intend to make any such commitment on my behalf, and my more general discus-

sion with Mr. Edmisten did not include a specific commitment to appear at any particular hearing.

As you know, your original letter of invitation transmitted three bills: (1) S. 858, Senator Fulbright's bill dealing with the invocation of executive privilege and the furnishing of information to the Congress and the General Accounting Office by agencies of the Government; (2) S.J. Res. 72, Senator Ervin's resolution to require production of requested information to Congress by agency heads, officers and employees of the United States except where the President formally invokes executive privilege; and (3) S. 1142, Senator Muskie's bill to revise the Freedom of Information Act in a number of respects to include a new provision dealing with the furnishing of information by agencies to Congress. An examination of these bills, within the context of the stated purpose of the hearings to cover "Congressional and public access to official information" led me to conclude initially that I could not add to the testimony you will be receiving from the Attorney General.

With full appreciation for your renewed request for my appearance, these bills have been reexamined in light of your most recent letter. I have also studied my testimony of February 7 as reflected in the hearing record to which your letter referred. Having done so with considerable care, I have determined that I could add little to what is already a matter of record and nothing to what you will learn from the Attorney General, who is the Administration's principal authority and spokesman in the areas of executive privilege and freedom of information. It is to the Department of Justice that we and all other agencies look for guidance in these areas. Our deferral to the Attorney General for purposes of your hearings is therefore both logical and appropriate, and certainly consistent with my testimony of February 7.

I will continue to honor Congressional requests for my appearance whenever possible, with due regard to the contribution I can make as a witness and consistent with other conflicting demands.

While I will, of course, continue to do my best to cooperate with you and the Congress in future requests for my appearance, as I have tried to do in the past, I must against respectfully decline your invitation in this instance.

Sincerely,

ROY L. ASH, *Director.*

APRIL 4, 1973.

ASH REFUSES ERVIN, MUSKIE REQUEST FOR SECRECY TESTIMONY

Senators Sam J. Ervin Jr., D-N.C., and Edmund S. Muskie, D-Maine, issued the following statement today on the refusal of Office of Management and Budget Director Roy A. Ash to testify before their joint hearings on Executive Privilege and Government Secrecy. The Senators also announced the list of witnesses for the April 10, 11 and 12 hearings.

"The refusal of Mr. Ash to give us his testimony on government information policies he helps formulate evidences the same general disdain for the role of Congress that also marks the Executive Branch's persistent efforts to deny the Legislative Branch the information it needs to perform its duty.

"Mr. Ash's position at the center of power over budgetary information is evident. He has already stated his opposition to measure we support that would enable the Congress and the public to see agencies' estimate of the *real* budgetary needs before his Office rewrites those estimates into sanitized fairy tales.

"We have discussed that policy with Mr. Ash before, without being able, under pressure of time, to obtain a clear understanding of his preference for secretary. Now he refuses an invitation to elaborate his arguments, suggesting to us that he prefers secretary to cooperation.

"Our hearings will explore the whole area of policy concerning the handling, protection and disclosure of information controlled by government officials. The issues involved are not narrowly legal ones, but extend, among other things, to practices of setting fees for access to government files.

"The Office of Management and Budget plays a major role in shaping such policies. The refusal of its director to discuss those policies with the Congress blocks intelligent analysis of Administration practice and hampers the effort to reform procedures which now, in many instances go counter to the intent of Congress.

"We deeply regret Mr. Ash's refusal to cooperate."

Following are the names of witnesses who will appear at the joint hearings of Senator Ervin's Subcommittee on Separation of Powers of the Judiciary Committee and Senator Muskie's Subcommittee on Intergovernmental Relations of the Committee on Government Operations. The Judiciary Subcommittee on Administrative Practice and Procedure, chaired by Senator Edward M. Kennedy, D-Mass., will also participate in the hearings.

April 10

Senator J. William Fulbright (D-Ark.)
The Honorable Richard Kleindienst, U.S. Attorney General
The Honorable Clark Clifford former Secretary of Defense

April 11

Senator Adlai Stevenson, III (D-Ill.)
David Cohen, Vice President, Common Cause
Harding Bancroft, *The New York Times*
The Honorable Elmer Staats, Comptroller General of the United States

April 12

Ralph Nader
Representative William Moorhead (D-Pa.)
Raoul Berger Harvard Law School

"THE RIGHT TO KNOW VS. EXECUTIVE PRIVILEGE AND GOVERNMENT SECRECY"

(By Frank Rodio, Jr., of Hammonton N.J.)

Mr. Chairman and distinguished Members of the Subcommittee on Intergovernmental Relations, Separation of Powers and Administrative Practice and Procedure.

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives . . . the executive power shall be vested in a President of the United States of America . . . he shall take care that the laws be faithfully executed . . . the judicial power of the United States shall be vested in on Supreme Court, and in such inferior courts as the Congress may from time to time ordain to establish."—United States Constitution.

I have cited the above clauses from the Constitution because they not only enumerate the separation of powers doctrine of the executive, judicial, and legislative branches of the United States Government but also illustrate the unique nature of the checks and balances system as well as the current debate over executive privilege and government secrecy. Executive privilege and government secrecy is as old as the United States itself and while not being part of the Constitution's "expressed powers" they are part of the Constitution's "implied powers" evolving through generations of customs and usage. Early examples of executive privilege and government secrecy in the history of the United States are President George Washington's conduct of the "Whiskey Rebellion," the Northwest Territory Indian Wars and delicate diplomatic negotiations with France and the United Kingdom.

President George Washington agreed to consult Congress only in secret session. President John Adams had to contend with a United States-United Kingdom "trade war" and a near shooting war with the French Republic's French Directory. Here is a chronology of presidential as well as congressional abuse of executive privilege and government secrecy. President John Adams also agreed to consult Congress only in secret session. On May 15, 1797 Congress met in special session to consider relations with France.

President John Adams appointed a three man special diplomatic commission to France on May 31, 1797. The infamous XYZ Affair opened with France on October 18, 1797. The French Directory on January 18, 1798 says all neutral vessels with cargo from United Kingdom or her possessions are fair prize. President John Adams reports to Congress on March 19, 1798 on failure of negotiations with France and on April 3, 1798 submitted to Congress XYZ Affair papers.

Congress suspends commerce with France and her dependencies on June 13, 1798. Congress passed on June 25, 1798 an aliens act concerning aliens in time of peace and also passed on July 6, 1798 an alien Enemies Act. The two most controversial pieces of legislation passed during John Adams' Presidency abus-

ing civil liberties, executive privilege and government secrecy were the July 6, 1798 Alien Act and the more infamous July 14, 1798 Sedition Act suppressing government criticism.

All these measures despite the nature of the existing national emergency were in direct violation of the United States Constitution's First Amendment. The first Congresses and Presidents seriously abused the "separation of powers" doctrine under the unique checks and balances system of the United States Government. The Civil War of 1861-1865 and the notorious Reconstruction Era saw another period of serious abuse of executive privilege and government secrecy. Congress violated the principle by creating the vindictive Joint Committee on the Conduct of the War. President Abraham Lincoln rightly suspended civil liberties as he was empowered to do by the Constitution to combat a domestic insurrection.

After Abraham Lincoln's assassination and death on April 14-15, 1865, Congress sought to reassert its authority over the new President Andrew Johnson, the judiciary and the conquered Confederacy. Congress created the Joint Committee on Reconstruction and enacted into law the March 2, 1867 Reconstruction Act and Tenure In Office Act. Congress sought to control the President's cabinet and the South. President Andrew Johnson fought Congress with a reduced veto power after the 1866 election and was nearly impeached and removed from office on May 16, 1868.

The classical confrontation between President Andrew Johnson and the Reconstruction Congress made the institution of the Presidency what it is today, the most powerful political office in the world. The President has a perfect right to control his own cabinet and administration. During wartime the United States Government also has a right to suspend civil liberties and control "the right to know." This was obvious during World War Two.

The United States was involved in a fight for its very survival. Congress created the Office of War Information to act as official censor. Now conditions and times are different. The United States is in the age of nuclear diplomacy with atomic and hydrogen weaponry. The postwar period has witnessed much abuse of executive privilege, government secrecy and the public's right to know. Congress was the scene in 1954 of the Army-McCarthy confrontation. The late President Dwight David Eisenhower asserted it was the President's responsibility for keeping disloyal and otherwise undesirable persons out of the United States Government's executive branch.

The late Wisconsin United States Senator Joseph Raymond McCarthy contended committees of Congress had the right to search for communists and traitors. The 1954 Army-McCarthy confrontation was similar to the Reconstruction-era battle earlier mentioned. The late Wisconsin Senator invited all persons employed in the executive branch to testify and give him information on any matter regardless of executive privilege.

The late President Dwight David Eisenhower rightly invoked executive privilege since the Constitution invests all responsibility for the Executive Branch in the Presidency. The late President Dwight David Eisenhower's administration invoked executive privilege 34 times from 1953 to 1961 according to a Library of Congress study. The late President John Fitzgerald Kennedy's administration invoked executive privilege four times from 1961 to 1963. The late President Lyndon Baines Johnson's administration invoked executive privilege two times from 1963 to 1969.

Congress greatly assisted "the right to know" when it passed the June 20, 1966 Freedom of Information Act (effective July 4, 1967). This little-used legislation authorized citizens to file federal court suits to obtain information improperly withheld. Notice carefully the following categories of exemptions: national security, trade or financial secrets, personal and medical files, and official correspondence. President Richard Milhous Nixon's administration invoked executive privilege 15 times with the President personally using it four more times.

President Richard Nixon assisted "the right to know" by issuing Executive Order Number 11652 (effective June 1, 1972) "Classification and Declassification of National Security Information and Material" on March 8, 1972. Executive Order Number 11652 established the following classification categories for government documents: top secret, secret and confidential and reduced the number of personnel who have authority to classify official documents as well as opening up to public access more documents previously classified.

Executive Order Number 11652 was issued after the furor over publication by "THE NEW YORK TIMES" and other papers of the top-secret Department of

Defense study on United States involvement in the Vietnam War known as "the Pentagon Papers," Alaska United States Senator Michael Gravel performed a valuable public service by reading portions of "the Pentagon Papers" into the printed record of hearings transcript of his United States Senate Committee on Public Works Subcommittee on Public Buildings and Grounds. The Alaska Senator was protected from prosecution by congressional immunity.

The United States Supreme Court, in its landmark June 30, 1971, decision, upheld the First Amendment right of "THE NEW YORK TIMES" and others to publish "THE PENTAGON PAPERS." I support that decision. The late Drew Pearson's protegee columnist, Jack Anderson, abused the right to know by publishing excerpts from sensitive top-secret National Security Council minutes on the 1971 India-Pakistan South Asia War. Jack Anderson was wrong in publishing what has become known as the "Kissinger Papers."

United States policy was being debated at these meetings. India and Pakistan felt what was published in Jack Anderson's column was official United States policy. Misunderstandings and tensions developed as United States-India relations deteriorated. Members of the "fourth estate" including Mr. Jack Anderson must exercise responsibility when reporting and analyzing the news. Such actions by Mr. Jack Anderson and other "fourth estate" members may bring on the very government censorship which they oppose.

The current Administration has invoked executive privilege 19 times as I mentioned earlier. The President recently ordered all of his present and former White House aides not to testify before committees of Congress. This action in my opinion is not executive privilege but executive arrogance as it almost certainly will handicap current congressional inquiries and probes. The United States Senate Committee on the Judiciary is considering the nomination of Louis Patrick Gray III to be Federal Bureau of Investigation permanent director. The United States Senate Special Committee on Presidential Campaign Activities is probing political espionage.

Both committees have requested White House aides to testify and have been refused. The President's application of the executive privilege in these instances is handicapping the Congress. The cases of Gordon Rule and Ernest Fitzgerald are other examples of executive arrogance. Messrs. Rule and Fitzgerald were dismissed from their jobs because they did their jobs too well. While executive privilege is an important element in the unique checks and balances system of the United States Government, it must not be abused. I recommend enactment into law by Congress of S. 858, S. 1142 and S. Res. 72 which combined with similar legislation requiring Executive Branch accountability and reasonable executive privilege to safeguard the public's right to know.

CONGRESS MUST REASSERT ITS CONSTITUTIONAL AUTHORITY AND RESPONSIBILITY

The NATIONAL TRADITIONALIST CAUCUS, a nationwide conservative youth organization, hereby affirms its belief that the Constitution of the United States must be preserved and observed as it was written and intended by its authors, our founding fathers. The Constitution sharply limits, throughout the first ten articles, the powers of the Federal government generally of the executive branch in particular.

Over the past four decades and more, we have seen a steady erosion of our Constitutional Republic. One clause of the Constitution after the other (especially Article Ten) has been flaunted or distorted. Executive Departments for which the Constitution makes absolutely no provision at all (i.e. HEW, HUD, and Transportation Departments, just to name a few) have been set up which have resulted in endless bureaucracy, and waste of taxpayers' hard-earned money. Little further elaboration is necessary.

The answer to most of these problems is not an easy one, but it is fairly simple. Part of the responsibility lies with the courts, but especially the Supreme Court. The Supreme Court must stop judging legislation by its own whims and preferences and what it deems to be "socially advancing" or whatever. Legislation must be ruled upon by its Constitutionality, and nothing else.

Most of the responsibility, however, lies with our Congress. Our Senators and Representatives must cease to be a passive echo of the White House, as has been far too often the case over the past four decades. Congress can begin to reassert its authority by putting the test of the first ten articles to most of the legislation enacted over the last sixty years. For it is much of this legislation which attempts

to limit the freedom given to us by the Almighty and written into the Constitution by our founding fathers. Let Congress reassert its authority over the executive branch of government. This must be done before the rights of all of us are usurped. The NATIONAL TRADITIONALIST CAUCUS supports any responsible effort of Congress to reassume its Constitutional role and prerogative.

To find out what more you can do to fight centralism and preserve our liberties, write to:

National Traditionalist Caucus
P.O. Box 2410 G.P.O.
New York City, New York 10001

FREEDOM OF INFORMATION

PART 1—NADER CONFERENCE

THE CENTER FOR STUDY OF RESPONSIVE LAW—CONFERENCE ON THE FREEDOM OF INFORMATION ACT, SEPTEMBER 22, 1972

Conference Director: Ronald L. Plesser

RONALD PLESSER. Good morning. My name is Ron Plesser, and I think as most of you know, I'm with Ralph Nader's Center for Study of Responsive Law.

Today's Conference on Freedom of Information we hope will be a unique experience in government relations. Without reading the names of the participants . . . and when I mean "participants," I'm referring to everyone in the audience . . . attending this morning, I can assure you that there is present in this room at least one representative from every department and from most of the agencies.

This is the first time that we can recall where representatives from all over the government have come together to discuss any problem, let alone, access to government information with "the other side." We hope that this will be an honest discussion of the problems and that it will not take on the aspects of an adversary proceeding.

There will be prepared presentations, but it is hoped that the bulk of the discussion and the analysis comes from you, the people who are responsible for the preparation and implementation of the Freedom of Information Act. We have called this conference to present to you some of our ideas concerning the Freedom of Information Act, and to find out some of your ideas.

Each agency and each department has different regulations and practices and it is hoped that as a result of this meeting, the agencies will have a better idea of what can be done and what should be done to implement and guarantee the public's right to know.

As a result of this forum, we hope to prepare some model regulations and some model proposals that we can distribute both to the participants and then perhaps distribute them to other people as a proposal for the future.

Congressman William Moorhead is the Chairman of the House Subcommittee on Foreign Operations and Government Information. As you are all aware, Congressman Moorhead has been a very, very strong and effective force in the field of Freedom of Information.

Congressman Moorhead's Subcommittee just completed extensive hearings on the Freedom of Information Act and he, more than any other person, I think, in the government, is aware of the problems and deficiencies as well as some of the good points and benefits of the Freedom of Information Act.

We are honored to have him with us today to start off this meeting, especially in light of the fact that this is the end of September during an election year. Thank you.

Congressman MOORHEAD. Thank you very much Mr. Plesser. You mention that this is an election year and it's my intention to be as brief as possible, that is, as brief as it is possible for a politician to be in an election year. And if you think that's brief, you're an optimist. As Hubert Humphrey used to say about an optimist, "When I come to the part of my speech where I say, 'and now in conclusion,' any woman who puts her shoes back on again is an optimist."

But I will endeavor to be brief because what is important here today is not what I say here, but what you do here. You have launched a conference that is unprecedented. You have the opportunity of really bringing about some effective changes in the operation of the Freedom of Information Act and in the

general attitude of government towards freedom of information by the public to know what their government is doing.

I think that the Center for Study of Responsive Law is to be commended for its leadership in calling this timely conference. I am also pleased, as Ron said, there are so many representatives of the executive departments and agencies here today who do have the responsibility for administration of the Freedom of Information Act.

I trust that the exchange of information and ideas from experts on all sides will be candid, instructive, and mutually beneficial. I look forward to your report on model regulations and model proposals. I trust that you will also study the report which our subcommittee has released today on the administration of the Freedom of Information Act.

This is just our first report, and we're going to follow it up with others in the general field of Freedom of Information. Our committee held extensive oversight hearings on this problem. We held forty-one days of hearings on the Freedom of Information Act and related fields. We received testimony from 142 witnesses, members of Congress, representatives from the executive agencies, the media, litigants under the Act, scholars, attorneys, and other experts having direct experience with the freedom of information matters.

I am also pleased that it was possible this morning to release this 89-page report from the House Government Operations Committee that is based upon the first part of these hearings on the administration of the Act.

It was unanimously approved by the committee and is the first comprehensive report reviewing the operation of the Act during the past five years that it has been in effect.

The report makes a number of important administrative recommendations that will be of particular interest to those of you who are here from executive departments and agencies.

The major problem areas that we uncovered in this investigation or report are, first—the bureaucratic delay in responding to an individual's request for information. Major federal agencies took an average of 33 days in acting upon an appeal from a decision to deny the information to an individual. And in the appeal phase, major agencies took an average of 50 additional days.

Second—the abuse in fee schedules by some agencies for searching and copying of documents or records requested by individuals. Exorbitant charges for such services have been an effective tool in denying information to individual requestors.

Third—the cumbersome and costly legal remedy under the Act where an individual who is denied information by an agency, chooses to invoke the injunctive procedures to obtain access. Although the private citizen has won and the government bureaucracy has lost a majority of the more than 150 cases under the Act that have gone to federal courts, the time that it takes, the investment of many thousands of dollars in the attorneys fees and court costs, and the advantages to the government in such cases, makes litigation under the Act less than feasible in many situations.

Fourth—the lack of involvement in the decision making process by public information officers when information is denied to an individual making a request under the Act. Most agency regulations provide for little or no input from public information specialists. And the key decisions are made by political appointees, general counsels, assistant secretaries, and other top echelon officials.

Fifth—the relative lack of utilization of the Act by the news media, which had been among the strongest backers of the enacting of the Freedom of Information legislation prior to its enactment. In this situation the time factor is the significant reason because of the more urgent need for information by the media to meet a news deadline. The delaying tactics by the federal bureaucrats are a major deterrent to the more widespread use of the Act, although the subcommittee did receive testimony from several reporters and editors who have taken cases to court and eventually won out over the secrecy-minded government officials.

Sixth—the lack of top level priority in most federal departments and agencies toward the full implementation and proper enforcement of Freedom of Information Act policies and regulations. A more positive attitude in support of open access from top administration officials is needed throughout the executive branch. In too many cases information is withheld, overclassified, or otherwise hidden from the public to avoid administrative mistakes, waste of funds, or political embarrassment.

The problem of excessive government secrecy is not new. It was not invented by the present administration. Down through our history, no administration has been able to resist the overwhelming political pressure to withhold information from the public and from the Congress to prevent embarrassment, scandal, or blunders by those in power.

But no president, on the other hand, has totally escaped the embarrassment of leaked information thought safely hidden away in the dark corners of the federal bureaucracy.

These are some of the areas that were covered in the Subcommittee's report approved by the full Committee on Government Operations and released to the press today.

The report makes a number of important administrative recommendations which will be of interest to you. I might say to you that following up on these recommendations, it is my intention to transmit formally, to each department and agency, a copy of our report. My transmittal letter will call specific attention to these administrative recommendations and will request by a date certain, a formal response indicating the specific actions planned to implement these committee recommendations.

In the report you will also see a number of broadly stated legislative objectives to remedy certain weaknesses in the Act which we feel require legislative amendments to the Act. I plan to introduce legislation to carry out these legislative objectives prior to the adjournment of this Congress. I am hopeful that this bill will be carefully studied by those of you present here today and others interested in the effective administration of the Freedom of Information Act.

This bill will be a vehicle for intelligent and constructive criticism so that in the next session of the Congress an improved bill can be introduced and acted upon.

I hope that you will send your comments and suggestions to our subcommittee when you review the report and the legislation so that additional improvements can be made in this legislation before next year.

Our subcommittee plans to hold hearings on such legislation early in the next Congress so that it can be acted on promptly to strengthen, clarify and improve the present Act.

Again, let me say, thank you for inviting me to be with you this morning. The Freedom of Information Act is a milestone in the long struggle to achieve full and responsible self-government. Meaningful participation in governmental affairs can be possible only through an informed citizenry. Secrecy in government is the enemy of our representative system and a cancer on the body politic.

Our hearings revealed that . . . and our report states . . . that because of the Freedom of Information Act, although far from perfect, vast amounts of government information have been made available to the American public that would otherwise have been hidden away. At the same time, we recognize that there are a number of important administrative and legislative actions that can and must be taken to make the Act truly effective and fulfilling its vitally important responsibilities in our free society.

Let's get on with the conference, get on with the job of making the Freedom of Information Act more effective and more responsible and more responsive to the public interest.

This is in the national interest of our great country. Thank you.

Mr. PLESSER. Thank you Congressman Moorhead. We, I think, are all anxious to study your report quite carefully and to see what recommendations and problems that your report has brought up and look forward to the follow-up procedure that I'm sure that the committee will undertake.

Our panelists this morning for this segment come from both government and public interest. They will present problems of access and availability of information from both points of view. The purpose of each person making a presentation will be to present problems and to elicit responses.

We would like each person to be able to complete what he has to say, and then if there are comments after that individual has spoken, to hear them.

Let me first introduce the panel in the order that they are going to speak.

Peter Schuck, is a consultant to the Center for Study of Responsive Law and has been quite active in requesting information under the Freedom of Information Act. He is presently plaintiff in two Freedom of Information Act cases and more to come.

Peter will have some comments as to what problems he's had as a researcher and as an attorney working for the public interest in getting information from the government.

Robert Saloschin is with the Office of Legal Counsel of the Department of Justice and heads the Freedom of Information Act Committee in Justice which reviews final agency denials on information.

I think Mr. Saloschin perhaps is the most knowledgeable and experienced person in the government on Freedom of Information and it is a great pleasure to have him with us today.

Anthony Mondello is General Counsel of the Civil Service Commission and was also in the Office of Legal Counsel doing much the same thing that Mr. Saloschin was doing—trying to organize federal policy on the Freedom of Information Act.

Mr. Mondello will speak about some of the particular problems and, in one case, he will discuss one type of information that we have requested from the government and some of the difficulties that he sees as an administrator in getting information released.

William Dobrovir is a private practitioner and has had extensive experience in litigating Freedom of Information Act cases. Some of you might know Mr. Dobrovir's name because he was included in the *Super-Lawyers*, a book about Washington lawyers.

Among the many cases that Mr. Dobrovir has been involved in was the *Wechsler vs. Schultz* case where he obtained access to all Walsh-Heally reports in the Department of Labor, and that case stands as a landmark for the type of information that the Freedom of Information Act should be used for.

Sam Archibald is the head of the Washington Office of the University of Missouri Freedom of Information Center. He has a strong background in journalism and was staff director of Foreign Operations, Government Information Subcommittee when the Freedom of Information Act became law. Mr. Archibald also is one of the most experienced and knowledgeable persons in the field of freedom of information.

I would like to start the panel with Mr. Schuck.

PETER SCHUCK. Thank you Ron. I think it's probably well to begin a discussion of the actual experience under the Freedom of Information Act with an identification of some of the Act's merits, before I launch into a criticism of the way in which those merits have been distorted.

First of all, the Act put Congress and the President on record as strong advocates of full disclosure to the public of the way in which the public's business is carried out. Yet even with this viable principle in the forefront, it's quite clear that in practice it has been marred.

For one thing, Congress has not yet seen fit to apply the Act to its own operations and I would hope that the report of Congressman Moorhead's committee would include such recommendations. I've not yet read it.

Secondly, the President has not vigorously disciplined agencies or officials who flout the Act. It's well to advocate the principles embodied in the Act in the abstract, yet we haven't seen the hard deterrence which is necessary to ensure that officials comply, and that can only come from higher level political appointees.

The second merit of the Act is that the Act shifts the burden of justification and proof to the official seeking to deny the public information. The official must find an exemption. Now while this fact has led to some remarkably tortured readings of the Act and has also led to some wonderful comic relief in terms of some of these tortured readings, it has led to disclosure of some information that might not otherwise have been made available.

To that extent, I think it's a very valuable principle. The Act however, clearly has failed, and I think it's appropriate to look at the Act's demerits to try to understand that failure and to enable us to begin to remedy it.

The nature of abuses under the Act have been described at length elsewhere, and I'll just refer you to those citations because they are a rather full and colorful explanation of actual experience under the Act.

Ralph Nader wrote an article in Volume I of the *Harvard Civil Rights, Civil Liberties Law Review* called "Freedom From Information," and this article recounted the experience of the first few years of the Nader task forces dealing with the agencies under the Act.

He identified such bureaucratic techniques as the "contamination technique," under which classified information is mixed with unclassified information thus

tainting the entire batch of information and making it all classified, despite its original status as unclassified.

Secondly, he described what I would call the infinite regression technique, whereby an agency will deny you the information necessary to determine what information exists and where it is located. This is an obviously important tactic because the Act requires that the information request be made with a certain degree of precision and specificity.

An example of this was in 1969 when the task force studying the Pesticide Regulation Division of the Department of Agriculture, was denied access to the Index files which identified the various pesticide regulation petitions that existed. So obviously they could not make a specific request.

Now there are some other abuses that Nader does not talk about in that article, that I have experienced in my workings with the Act.

One technique is what I call the "fob him off with a meaningless summary technique," that is, where an agency will summarize the detailed information that you need and provide it to you in a table or in an otherwise useless form in which the underlying data which constitutes the foundation for the summary is not available to you.

A second technique is what I call, "delay until the information becomes stale technique," and anybody who has worked with the agencies in this regard will recognize that familiar face.

I note that the report of the Subcommittee states that the average period of time for initial action on an information request is 30 days, and on appeal is 55 days. We have found that to be a rather remarkably fast response.

I would say our average is at least twice or three times as slow as that.

A third strategy that we've encountered is the old, "it's exempt because it's embarrassing," routine. An example of this is a series of factual reports based on, and resulting from, investigations conducted by the Office of the Inspector General within the Department of Agriculture, their reports on the civil rights performance of the Extension Service.

These reports have been prepared for five and six years, year after year, detailing the continuing racial discrimination on the part of the Federal Extension Service, and they are purely factual reports. There are no names in them.

There is no tentative kind of opinion in them. Clearly, they are final factual reports, yet they are exceedingly embarrassing to the Department of Agriculture and they will not release them. Accordingly, we have had to go to court to obtain them.

Another technique which we were beginning to find as we had more experience with the Act was the "sue us again," gambit in which we will undertake a very expensive lawsuit, requiring two years and more to get a final judgment on appeal against the agency, giving us the right to get the information.

And then we go back to the agency for the information or we ask for information that is subject to the terms of the order, but is slightly different, and the agency says, "Well, I'm sorry but that wasn't covered by the order, you'll have to go back and sue us again."

Just to give you some parameters of the nature of this abuse, consider the case of *Wellford vs. Hardin*, which took precisely two years in the courts, which means that it took somewhat closer to a two and a half years given the administrative appeals that were made for certain information. We won in the District Court and we won in the Court of Appeals, and the Department of Agriculture insisted on appealing and then on waiting until its time to appeal to the Supreme Court of the United States had expired to finally produce the information—that case according to the attorney who represented us, resulted in perhaps \$10,000 in billable hours.

Fortunately, we were able to obtain the services of a private attorney who was willing to donate his time, but the out of pocket expenses themselves were well over \$500 and the billable hours approached as I said, over \$10,000.

Needless to say, average citizens do not have that access to the free and inexpensive talent that we do, and needless to say, they have difficulties under the Act far greater than ours.

A final technique that I would mention is the "now its public, now its private" technique. An example of this is the work of the Department of Transportation which had contracted certain studies out to its consultants, yet it claimed that the work of these consultants, who were private parties, not members of government, were so-call intra-agency memoranda and therefore exempt under the Act.

What all this adds up to is that the Act is unenforceable. Now why is it

unenforceable? Well, many of us in this room are lawyers, and lawyers have a habit of seeing statutory defects as a matter of draftsmanship, and I suppose the principle that would emanate from this would be that the exemptions of the act are overly broad.

Well, this may be a heretical view, but I don't think that's true. I don't think that's the problem with the Act. The courts have somehow been able to construe these exemptions reasonably and narrowly. The question is why haven't bureaucrats construed them in the same way?

Well, I think the real problem stems from our inclination to regard what goes on in the bowels of bureaucracy as non-political and routine. This is a very, very false notion and one which is only beginning to reach the consciousness of people who work in Washington around the executive departments.

In my view the Freedom of Information Act is foundering on the rocks of bureaucratic self-interest. It is unenforceable because the decision to release information is entrusted to those very officials with every incentive to withhold it and no incentive to release it.

If I had to come up with an analogy, I would say that its . . . and many of you will regard this as an extravagant and fantastic invention, but I'll throw it out anyway . . . its sort of like permitting a politicized Justice Department to decide whether to tell the public about the alleged defalcations of the White House. That's a perhaps unrealistic analogy, but I think its the closest one.

Well, I trust that this conference will occupy itself then, not with vain and tedious denunciations of those nasty bureaucrats, for we must realize that these bureaucrats in a very real sense simply cannot help themselves. Rather, I hope that we will spend our time on more fruitful constructive efforts to so structure bureaucratic self-interest that it will yield the information which the public needs to understand the public's business.

Thank you.

Mr. PLESSER. The next speaker is Mr. Saloschin of the Department of Justice.

ROBERT SALOSCHIN. Ron you suggested that, since the main theme of your Conference is problems which have been encountered by various concerned groups in the field, I should try to discuss something about problems encountered by the executive branch agencies which are supposed to administer this Act.

And I have a few ideas on this. What I am going to say represents my own ideas and in no sense is an official statement of position for the executive branch, the Justice Department, the Office of Legal Counsel or the Freedom of Information Committee.

And even speaking for myself, I reserve the right to change my opinion . . . [laughter] . . . as circumstances and additional considerations may warrant.

What I have to say, however, is based on my own perspective in working in this field. I've been spending a major part of my time in this field, in the last few years working principally with other departments and agencies of the government.

And the problem that I'm going to refer to, I think, is a problem which to a considerable extent underlies the two problems that concerned previous speakers and others with similar concerns.

There is a great deal of emphasis on delay and concern with delay as a problem, and there is also of course, considerable concern expressed by Mr. Schuck and others, with what are alleged to have been wrong decisions, the wrong results, or call it inadequate consideration.

Well, without necessarily agreeing in any specific instance or disagreeing in any specific instance, let's assume that both of these things are areas in which there should be improvement, delay and the quality of the final outcome in these situations.

Now what I'm going to suggest is that from the government's viewpoint, at least my own observation of it, a problem which underlies both the problem of delay and the problem of quality of the result, is the problem of manpower—government manpower to process Freedom of Information requests.

I am speaking here primarily of legal manpower, but it is also true of any other type of manpower—administrative, operational, program, clerical, public information—that may be involved in a particular agency and a particular request.

Unlike other fields of law such as Labor law or Tax law, or Real Estate law, Information law or Freedom of Information law at the federal level has, as far as I'm aware, no corps of full time lawyers, and this is basic to the administration of the Freedom of Information Act that exists today in many parts of the government.

As you said Ron, I spend a good part of my time on this, but I would estimate very roughly that I spend no more than about 75% of my time on it. Maybe at this point it might not be a bad idea to ask the audience, which I am sure includes many Freedom of Information lawyers from federal agencies, if there is anyone in the room who over a period of say, six months, has spent substantially full time on Freedom of Information Act matters. If there is anybody like that present in the room, who spent full-time on Freedom of Information problems, would he or she please raise his hand?

I note for the record that no hands are raised. Is there anyone in the room who has, during the last six months or so, spent roughly 75% or more of his working time in handling Freedom of Information matters?

I see one hand. I don't know if that hand would stay up if I phrased the question to cover a year or two years, rather than six months. I think that this indicates that . . . and I am not saying that this is good or bad. There are certain advantages in a field like Freedom of Information in not getting too specialized and in retaining your perspective.

But what we have here is a situation which is, I think, likely to continue. If we are going to make available the manpower that groups such as Mr. Schuck represents or any other group that wants a faster and better administration of this Act, if we're going to meet that need, we will probably have to do so with, for the most part, part-time Freedom of Information lawyers and part-time Freedom of Information administrators throughout the government.

I'm not suggesting a corps of full time Freedom of Information lawyers. I have reflected on that and I think it might create problems from an administrative viewpoint, even from a personnel retention viewpoint. Fascinating as this field of law may be, I'm not sure that there are a lot of lawyers who want to spend 100% of their time on it.

So the work depends upon part-timers, particularly with the personnel turnover problem that we all know exists in government, particularly with young lawyers and also with top level presidential appointees and with others also, for instance Mr. Mondello on my left, who represents a leading member of our own Freedom of Information cadre which worked on the initial problems when the Act was passed, and no one, no one, who was in that cadre at the time is still with the Justice Department.

This is an indication of the turnover, but fortunately Mr. Mondello is still available to us and still has a very active interest in this field.

But under these circumstances, the expeditious and expert handling that you want, and that we want, is likely to depend on considerable ingenuity in organization of effort, good communication and good training. Now all of these things, of course, themselves take time, take leadership and . . . although they are necessary to reach the result, the short run impact is to subtract from the effort that goes into the day to day flow of work.

In other words, by my spending a day at this conference, there are Freedom of Information matters on my desk which are not going to get taken care of today. And that may be true of those here. So in order to achieve a desired result of improvement in good communication and training, we're going to have to take time out which in the short run perhaps, may aggravate the problem, but I think it's worthwhile because in the long run it will benefit it.

Now I have a few specific suggestions other than the general notion of improved communications and improved organization and improved training. For one thing, I think we can, to a certain extent, at least in some instances, cut down in the volume of legal work on Freedom of Information matters by granting requests where there is no serious policy objection to granting that particular request.

Now, I realize this a complex subject, but if someone asked for a certain document which may be exempt and may be similar to other documents which you object to releasing, but you have no particular objection to releasing that particular document, or that particular document to this particular requestor, then if the decision is made on a policy basis or discretionary basis to release it, maybe we can avoid an analysis from a legal viewpoint as to whether you would be compelled to release that particular document.

There are two limitations on this suggestion as I recognize. In some cases there may be a prohibition against the release. Many people raise the tortured question of 18 U.S.C. Section 1905, which prohibits the release of various types of commercial information. And of course we have the problem of classified information.

A second and more important restriction in many peoples' minds on discretion-

any releases, without taking the time for legal processing, is the widespread fear among bureaucrats of creating an administrative precedent of some sort and then being accused when another request comes for the same document or a similar document, which they really do have some objection to releasing, being accused of discrimination or being arbitrary and capricious or having created an administrative precedent or interpretation and thereby losing the discretion to deal with future requests.

Now I personally think it would be tragic if the discretionary release of documents in particular cases is restrained by the fear of a penalty, that will attach to it in cases that maybe are down the line and haven't arisen yet and may present different circumstances. I think in general that that fear is exaggerated, but I think in some cases it may be existing, and I recognize it as a restraint upon release without spending time on legal analysis.

Another way of course, a somewhat similar way to speed up and conserve legal manpower and cut down on legal work is by what might be called "block discretionary releases," or release as a matter of policy by a regulation which says, perhaps in certain circumstances, or on no objection from somebody, "such and such a class of documents will as a matter of policy therefore be released."

The example that I have in mind is the recent regulations of the Food & Drug Administration which I think represented a considerable change of policy for that agency. Now of course I suggested earlier the possibility of instituting a regular training and proficiency maintenance program for all government Freedom of Information lawyers on a voluntary basis, and in this connection, I might note that the Department of Transportation organized a Freedom of Information seminar which I think was probably very stimulating and informative for the many lawyers in the Department of Transportation who attended it.

And I might say that the Department of Housing & Urban Development has recently run, I understand, a one day Freedom of Information seminar in two different parts of the country—one in Washington and one away from Washington, to cut down on travel time I guess.

And this shows that the need is being recognized throughout the government for some kind of periodic training, perhaps once a year, perhaps twice a year, in one day seminars, to up-date people who will not devote full time to this field and do need this kind of assistance and guidance.

Now of course all these ideas take manpower away from the line processing of Freedom of Information requests, just as I'm sure Ron it took you a long time to organize today's conference.

And I might say that agencies would probably be willing to make more manpower available in the field if they could retain such fees as are collected. Now I don't want to get into fee levels, but at the present time it does an agency no good in terms of spreading its staff over its full range of responsibilities to collect a fee because the fee gets turned over to the Treasury Department.

If it would or could collect that fee and use that for budget purposes, this might in some instances, at least over a period of time, ease the manpower strain. Also, since this work is an additional burden imposed upon the staffs of all government agencies, there should perhaps be some reflection of this situation in an agency's appropriation.

All of these things would tend to make more manpower available for this work. Now I think I've talked long enough. I just would like to mention one other problem with the agencies other than the manpower problem which I think underlies the problem of both delay and quality.

I want to mention this problem because it was suggested to me by Miss Fredericka Paff, a member of our Freedom of Information Committee in the Office of Legal Counsel.

The problem is this—to what extent under a statute which is records-oriented, should agencies try to satisfy what often is the requestor's real desire, namely, information, even when this means a considerable amount of digesting, culling and otherwise processing the records that do exist?

Now this comes up frequently when a requestor in effect wants to cull out of many different records, information which would answer a certain question. One of the responses might be to simply make available all the records in a certain category if they were not exempt, or if there were no policy objection to make them available, but this would perhaps leave the requestor with a crushing burden of research.

And what, if anything, should be done to help requestors in this kind of a situation or in similar situations? I have no suggestions to meet that problem

except to say that perhaps face-to-face discussion between the requestor and the agency people might arrive at some kind of a cooperative approach of benefit to both.

Thank you very much.

Mr. PLESSER. Thank you. Mr. Saloschin made some interesting points. I would encourage anyone in the audience who had any reaction to some of the things Mr. Saloschin said to respond if you'd like.

After all he was in effect representing what the agencies' problems are, and if you see the problems in a different light, we would encourage you to participate.

DAVID MARTIN (Special Assistant to the Secretary of HEW and Executive Director of the Secretary's Advisory Committee on Automated Personal Data Systems). I'd like to make two or three limited comments on Mr. Saloschin's remarks before they get lost in our memory.

When you opened the conference Mr. Plessler, I was struck by your indication that there were panelists from government and the public interest.

The inference to be drawn from that contrasting use of terminology being that representatives of government are to be distinguished from representatives of the public interest. And my . . .

Mr. PLESSER. I thought that would get a good response.

Mr. MARTIN. . . and my instinct was to resist the dichotomy that you posed in the use of those terms. I do not resist it after listening to Mr. Saloschin who used a couple of interesting terms which I think say something about an aspect of the problem in Freedom of Information which hasn't been identified by him. His phrase was "unless there is objection to release," as a test of what lawyers would do in advising their clients," and in another passage of his remarks, he said, "if the information isn't exempt or if there is "no policy objection to release," and I suggest that in those two words . . . those two phrases which I take it, emerge from his total experience in the administration of the Act, we have a very clear symptomatic indication of a problem.

That is that lawyers at least and their clients do not approach this statute in the terms in which it's written. Namely, information is to be made available unless it falls into certain exemptions. There's an overriding assumption it seems to me, in one's thinking about the Act, and I've detected this in my experiences in the executive branch, that there is also an unstated ground of objection or decision to release of information.

Namely, if, as Mr. Schuck suggested, bureaucratic self-interest or political policy interests suggest that it should not be released that that is a separate ground from any stated in the Act. And I think that's a fundamental problem which deserves at least as much attention as those which Mr. Saloschin commented upon.

The other thing I'd ask you is whether it wouldn't be useful at some point, to extend our insights into the problems under the Act with the clients. Lawyers have a fascination with laws and legal problems, and I take it your emphasis here is certainly on the panel, as lawyers or people who had to do with the creation of the law. Lawyers I think reflect the interests and expectations of their clients. The omission of top level line decisionmakers is unfortunate.

Mr. PLESSER. Well, let me respond quickly. We sent general invitations out to all agencies and to information people as well as in certain instances, line people, especially in the case of the Department of Agriculture.

To a certain extent, perhaps, we should have more structured our invitations, but I think to a certain extent, the responses of the agencies that could have responded with line people have sent line people. I think most of the people here are involved in Freedom of Information and are line people and can talk about the problems.

In certain cases, I think, unfortunately the line people were kept from attending.

We have some indications, for example, from the Department of Agriculture, that people were instructed not to attend other than assigned people. I think that points out some of the problem, that the agencies are attempting to insulate some of their line people from these problems.

And while we would have liked to have seen them, I think one of the problems is that they felt that they weren't the people to discuss it. The people to discuss it were either the press people, the information people or the attorneys.

Talking about clients, Mr. Schuck is my client, so at least there is one client present.

I'm the moderator but I'd like to relate one conversation I have had, and I think this backs up what Mr. Martin said completely. I had a conversation with a very high ranking public affairs official, who I'd rather not mention, because he talked to me in confidence about it. He said, "Well, you know, you're talking about regulations and laws. That doesn't mean anything. It's all politics, there's information and there's information. It's high level decision making. Really the only people worthwhile talking about Freedom of Information Act Regulations are presidential appointee level people." Now, I disagree with that. I'm not in the government, but it seems to me a critical point.

The people, hopefully, like yourselves, who represent the assistant secretaries, general counsels and line people who are responsible for the operation of this Act, will operate as far as the regulations and the laws dictate. And as Mr. Schuck said, I think some of the cases have been terrific, especially in this circuit, but some of the implementations of those cases have left much to be desired.

And I think Mr. Dobrovir will talk a lot about . . . hopefully, about policy and approach.

DICK WOLFE (Georgetown University Law School). In your remarks . . . first a question of information. Who sits on the committee at the Office of Legal Counsel with you and Mr. Mondello? What is the public input? Is anyone on the committee which presumably sets the policy, anyone non-federal officials?

MR. SALOSCHIN. Your first question is who is on this committee? Alright. The names and telephone extensions of the people originally on the committee are set forth in the footnote of the Department of Justice Memorandum of December 8th, 1969, which has been made available probably somewhere in the Moorhead Subcommittee Hearings and since that time, Mr. Zener, a Civil Division appellate lawyer, has left the Justice Department and is now with EPA.

He has been replaced by Mr. Fleischer, and Stephen Lockman has gone into private practice and has been replaced by Miss Fredericka Paff. I'm still one of the original members of the committee and the chairman.

The ex-officio chairman was Thomas Kauper who left the government and went back to the University of Michigan Law School and is now Assistant Attorney General for Anti-trust in our department. He was replaced first by Mr. Erickson when he was first in our office—Mr. Rehnquist was still there—and currently, the ex-officio chairman of the committee is Leon Ulman, who is the Deputy Assistant Attorney General in the Office of Legal Counsel.

There is another lawyer by the name of John Gallinger, but he is on detail to the U.S. Attorney's Office, so he is not functioning in this capacity at this time.

There are four fully active members of the Committee at the moment, two in the Office of Legal Counsel and two in the Civil Division.

MR. WOLFE. And as I understand it, the function of the committee is a federal government-wide policy making entity?

MR. SALOSCHIN. It's not a policy making committee. It is basically a counseling committee performing by extension the same function that has traditionally been performed by attorney generals and by the Justice Department of providing back-up legal advice to other departments and agencies when they seek it. This is the historic genesis of this kind of function.

Of course, we do perform a certain coordinating function because of the fact that we deal with so many different departments and agencies.

MR. WOLFE. I see. I don't mean this, by the way, in any personal way against you, but I would suggest that in a statute that is so fundamentally aimed at public disclosure, it might be for effective implementation, a good idea to have some members of the public, that is to say, a non-federal employee or employees on that committee.

Second, I would just like to mention one point that puzzled me, underlying again your remarks earlier. That is that the Act is fundamentally . . . you didn't say this in so many words . . . a lawyer's problem and one of the difficulties in responding to a request for information is the allocation of lawyer's time.

I would suggest that if this is in any sense the philosophy of your advisory committee or any federal agency committee, the underlying premise of the Act is not being adhered to. It is not how many lawyers can be devoted to the immediate problem, that is to say, whether it is a legal problem. It is a problem of disclosure and prompt disclosure in educating people as I believe Mr. Martin has said, who were in line positions, who are the ones often requested immediately to respond to information requests.

These people must be advised by the lawyers to, in most instances, disclose. Non-disclosure should be the rare exception and that should come from a policy

determination. Granted in the early years of the Act, we probably have to have some of this, but the problem should not be perceived as one of a lawyer's problem. It should be an education of public information and other officials.

And we should also, I would suggest, do everything we can in these agencies in which it is possible, to eliminate the internal appellate process. This is something that's nowhere suggested in the Act. It might be efficient in some agencies, but I would hope that your committee and others and departments would indicate in some instances, there be no internal appeal which would drag out this process even more.

Thank you. That's all I have to say.

Mr. PLESSER. Mr. Mondello would like to make a comment on that.

Mr. MONDELLO. I wouldn't be too unhappy about the intervention of lawyers in Freedom of Information Act affairs today. In the Civil Service Commission for example, where I work, we very early in the game discovered a kind of instinctive reaction to people who operate programs, which is to feel that they own their desks and they own their file cabinets and that they own the papers that are in them.

And if they had been left alone for lo these many years under Section 3 of the APA, they were relatively unused to turning things loose, just willy nilly. This was the basic impetus that caused the Act to be passed, namely, disclosure should be the rule.

The exemptions are there to be used if they are needed, but the instinctive reaction should not be to withhold. Well, we found very early in the game, in the Commission, and I went over there in 1968 shortly after the Act had been underway, we had a rather good set of regulations. They were relatively open. As a matter of fact, from the vantage point of sitting in the Department of Justice, when I did, and worked on Freedom of Information Act matters, we liked very much the openness of the Civil Service Commission with respect to a lot of its documentation which was apparently covered by this second exemption, but which was treated by the Commission as open.

And we commented on that in the memorandum we wrote. When I got to the Commission, I found that line operators still have these archaic notions. So we held some big meetings and tried to focus on every conceivable documentation that was maintained in the Commission in order to make decisions on whether something would be turned loose upon request or would be withheld no matter what and we'd go down fighting about it.

And then, of course, there were a lot of documents in between. It was the lawyers, not the line operators, who were giving the advice about the Act and how it had to be operated, who really were most constructive, fully as constructive as PIO men, and I suggested to Congressman Moorhead that the lawyers are a necessary ingredient in this picture because the lawyer who looks at the client when he comes in, says "My God, they want this precious document," has got to ask him "What's so damn precious about it?" The actual fact is, that, after several years now of operation under the Freedom of Information Act, in spite of 150 cases, there's been a helluva lot of information turned loose, as Congressman Moorhead suggested, and I haven't yet seen any of the walls of this government crack and crumble as a result.

We can tolerate a helluva lot of openness and it's lawyers in government who I think are persuading line operators that this is good for you and its good for the public and it's going to be done no matter what. I know with precision in my own shop, that when I suggest to the Commission when a question comes up before them about a particular form of documentation, that if it goes to a lawsuit, we will lose it, the document is turned over.

So I like lawyers being in the play at the moment.

Mr. PLESSER. This woman right here.

Ms. HART (Office of Communication for the Department of the Interior). I do want to commend Mr. Mondello for one thing. He's the first person this morning who has even brought up the fact that PIO's might be involved in any way in Freedom of Information. He's the only one who has mentioned the word.

It seems to be assumed by everybody on the panel who has so far spoken, that its either the lawyers or the line operators who make the decisions and should be making all the decisions.

I'm just putting in a case for ourselves.

Mr. PLESSER. I think Congressman Moorhead mentioned PIO's in his speech this morning...

Ms. HART. Congressman Moorhead always does, but unfortunately he is no longer here. [Laughter.]

Mr. PLESSER. Well, Mr. Archibald is I think a non-lawyer and he is on the panel...

Ms. HART. This is why I qualify by saying those who have spoken.

Mr. PLESSER. I'm sure he will come to your defense.

Ms. COCKERHAM (Freedom of Information Officer for Drug Administration). I think perhaps I should say a couple of things which would be of interest to Mr. Saloschin in regard to what we're doing in the area of training.

We are presently carrying out a training program by tape, the tape done by our General Counsel, Mr. Hutt, 25 minutes in length, remarks by myself and one other individual and a question and answer period to "educate," or at least bring to the attention of all the people including our top scientists who had never heard of the Freedom of Information Act before.

This also includes a question and answer period. I spoke to some 250 people for the Bureau of Food and Drugs. We now have appointed Freedom of Information officers for each of our main offices here in the Washington area, that's basically some 20 individuals—one for each of our field offices that's either 18 or 19 districts, we are constantly adding them, and 9 regional offices.

Now to me that adds up to something like about 50 people. All of whom will be working in this. The tapes are going out and will be shown and we anticipate showing this to some 800-900 employees.

At the close of the session yesterday when the top flight scientists in our agency came up to me and said, "My god, I wish we had this three or four years ago, our record would not have been so bad, and can't we do this on two or three sessions, from time to time, so you can keep us abreast of what's going on and educate us to this," because they will actually for the first time be reviewing documents. Since our record has been pointed out as being so bad, obviously we're quite proud of it.

I'd like to say one other thing. I've been serving in this capacity since February of 1969 and I've had eight bosses during this time and I've never been able to educate one yet. [Laughter.]

And finally, I'd like to say this. For those of us who are public information types and I am, because I also run the agency's information center. I would like somewhere along the way for us to . . . for you attorneys to figure out some way through your associations and whatever else, to train and educate yourselves to what some of the problems are, because in the last three weeks I've had everything from the most sophisticated patent attorney in New York City to a man who calls himself a naive Tennessee cowboy, turned attorney, who came to my office thinking that every record that the FDA has was in one repository and was very simple, it was all in my head and there was no reason why he couldn't see all the correspondence he wanted, between our agency and the manufacturer of two oral contraceptives.

And when I told him how many boxes it would take, some 18 or 19 volumes for one IND or one NDA he couldn't believe it. So somewhere these people that do not know and have not been dealing with us, should be informed as to what the Freedom of Information Act really is.

We have no problems with those lawyers we deal with regularly here in the Washington area.

Thank you.

Mr. PLESSER. Just one comment. Did you inform this person from Tennessee that not only were the NDA's and IND's in boxes but the regulations did in fact, prohibit the public disclosure of them?

Ms. COCKERHAM. Well, the regulations will not prohibit the disclosure of some of the things that he wanted. He's involved in a lawsuit and is asking for some correspondence which we will be able to make available to him. He's gotten a lot of his information already through the discovery process obviously, but he did not feel that he'd gotten everything he wanted.

He understood perfectly and we're working very closely, but here again is what Mr. Saloschin referred to, the face to face, or one to one situation and I'm one woman with eight hours and one assistant.

Mr. PLESSER. I'd like to proceed, Mr. Mondello.

Mr. MONDELLO. When I was debating what I should say this morning, I thought I should have a prepared address and I don't. I looked over some other prepared addresses I had made and I liked some of them, but I finally ran into the . . . that little blue covered manual, "The Attorney General's Memorandum on the

Act," and I regretfully discovered that I had apparently peaked out in 1967 about the Freedom of Information Act, I am not . . . I don't use it all the time. It represents a very minor portion of the time I spend on official matters.

So you're saved. I won't make a long prepared address. I just have a comment or two on the comments of Congressman Moorhead and Mr. Schuck.

There seems to be a great distrust of political officials. I guess that's endemic in a democracy. But you hear the characterization of them—when you talk about the Freedom of Information Act—in terms that represent them as terribly venal people who have a self interest in their own personal aggrandizement and who have no interest whatever in disclosure of documentation.

To me that doesn't represent the real world and the bureaucracy. I heard Congressman Moorhead complain that key decisions are made under Freedom of Information Act regulations by political officials, and he is suggesting that he is looking to changing all that. I'd like to remind you that his predecessor, Congressman Moss, was anxious to get documentation affairs out of the hands of the entrenched civil service bureaucracy who were playing games with it under Section 3 of the APA; and the reason the Act was changed, in large part, was to get decisions made by political officials who had some savvy about what public relations was all about, and would realize that when the time came, disclosures had to be made.

Now you can't cut that cake both ways. You're going to have to make up your mind as to which way you want to go. I favor putting the political officials on the hot seat. The big claim, when people were writing the regulations back in 1967, was that there were too many lawyers of appeal . . . and they stopped too far short, that they ought to go all the way up. So we in the Justice Department said, the Deputy Attorney General was going to have to take the heat.

And we ultimately made the Attorney General the final deciding official. I think that's where it belongs. Each agency can work out its own formalities for getting things up to the agency head who is usually frightfully busy, but its the kind of thing he ought to focus on. And people ought to bring him up short every now and again and say, "Why hide that kind of thing?" "Why shouldn't the public know about it?"

I don't have this terrible mistrust of political officials. I suggested a moment ago that the Chairman of the Civil Service Commission had a request for a document, about eight months ago, that everybody decided had to be withheld, and for the strangest of reasons. The document was addressed to the President of the United States and it responded to a document which came to us on White House stationery. For some reason, people held the belief that because something was so closely related to the President, nobody should see it.

Now, if you read Ken Davis you find that there are strong arguments to be made that the President, perhaps only parts of the executive office of the President, is not an agency under the APA and, therefore, the Act doesn't affect him or them. I think perhaps a strong argument can be made for non-disclosure of particular kinds of documentation that you would find in the White House around the President.

But the notion that every piece of paper that bears a White House letterhead or every piece of paper that is addressed to the President, could not be seen by the public, is of course ridiculous.

The one thing the Act did was to suggest that whenever anyone wants a document, you must look within the four corners of that document for the decision as to whether it is releasable or not releasable.

When I brought that simple idea to the attention of my chairman and suggested to him that there was nothing in the contents of the document that was sacrosanct, and the the requestor was entitled to the document, he just overruled everybody else, and out went the document.

There was no public comment on the disclosure. You'd think that such an important paper as a White House memorandum or a memorandum to the President would have gotten a little more publicity if the reasons for non-disclosure were valid. It was actually published in somebody's journal, a weekly journal on women, and drew no attention of any kind. As it turned out the paper proved to be a perfectly innocuous document which should have been disclosed—which was the way I suggested it be treated and the way the chairman treated it.

The notion of contamination technique that Mr. Schuck spoke of is abominable, and I never trust what I hear about this. I remember after the Hickman-Taylor case—the Supreme Court case that decided that the communications between a lawyer and his client about what the client had to say were a lawyer's

work product and therefore not disclosable—gave immediate rise to the idea in tort circles concerning accident case routines, which is what the Hichman-Taylor Case involved, that everybody in the government was thereafter going to take all documentation involving a tort case and place it in a file labelled lawyer's work product.

It's a perfectly silly idea. It never happened and I dare say it just couldn't have happened; nobody would have tolerated it, judges most of all.

Similarly here, the contamination technique is a suggestion that you take a classified document and put it in a file, and the whole file becomes classified. Well, in truth, if that's what you do, then if you want to protect that document you have to lock up the file and subject it to all the classification security techniques.

But that doesn't mean to say that if somebody asks for an unclassified document that's in that file, that the requested document is covered because laying side by side with it is another document that's classified. That's a lot of hogwash. I don't know of any agency that's doing that. If any of them are, they ought to stop it. It's a perfectly ridiculous idea.

I guess what I'm really against is the suggestion that it is really going on at and great rate. I don't know of any place where it's going on. Maybe Mr. Schuck can tell us about that.

But to me it's perfectly plain that the alleged technique is a form of dishonesty and it can't be tolerated.

I have mentioned the use of lawyers that I like to keep involved in Freedom of Information Act matters. If I can read just a passage. This is from Part 294 of Title V of the Code of Federal Regulations. It's the Commission's own regulations on Freedom of Information.

"In the event of a difference concerning the availability of disclosure of information under this Part between the members of the public and either an employee of the Commission or an employee of any other agency having custody of information controlled by the Commission, the matter shall be referred by the head of the Bureau or staff office concerned through the Director, Office of Public Affairs, to the Executive Director."

The Executive Director is our final administrative decision maker. We've got our PIO's in the act and they get in all of these cases.

Actually, I seldom get to see a Freedom of Information Act case, unless somebody wants to deny disclosure of the document. By that time our PIO office is already in it. And he's had his crack at persuading somebody that disclosure is good for you, that the document ought to be released because it's not classified, and it's not secret in any way.

I welcome PIO's because they have a fresh different look about these things. And on occasion it happens that publicity is good for you. I remember one incident which happened between Attorney General Ramsey Clark and me, and very early in the game.

He had a document that had to do with the bugging of participants in litigated criminal cases with the government. The Justice Department had a memo, I forget the number of it, but somewhere in the 400's . . . and he was asking me whether memo 497 or whatever it was should be released. It had been asked for by a Senator and by a member of the public.

I read the document and it was all for motherhood and god. It represented the Attorney General saying to the United States Attorneys, "You know what the courts are saying about bugging, that it affects any case; and I want you to make a complete survey of all of the cases from one time to another, and discover whether there was any irregularity of any sort, including bugging of course, and make a report on that. The memo also offered some instructions about the point at which he should tell the court about wiretaps and when to make reports, and so on.

I suggested to the Attorney General that this document should have been issued as a press release rather than be withheld, and the fact that it came in sequence in a series of numbered documents, many of which were internal and probably would not be disclosed, didn't threaten the rest of those documents merely because this one document was disclosed. In effect, I told him that number 497 could be released and you could still hold on to number 495 if they differed in content.

He was totally satisfied with that, and we disclosed the document. In short contamination is not a happy idea, or a tolerable one. Under the Act you must look at each document separately.

Here I am saying I wasn't going to make a speech and already I've talked too long, but the one thing that Mr. Plessner did ask me to mention is in litigation.

tion. Bob Vaughn of the Nadar forces has sued us for documents that are generated by our Bureau of Personnel Management Evaluation, which is the kind of inspection force that goes out and on a regular basis hits every agency about every two years, or some such period; but in between times, for example if we examine Air Force Headquarters on a nationwide basis, every two years, we will still hit different Air Force installations on a different schedule anyway.

In the process the Bureau is supposed to be finding out whether people are doing right by personnel management; whether they are really filling out the appointment forms properly for their appointments, whether they are treating people right on the job, whether they are paying whatever attention they should be paying to retirement matters, pay matters, adverse actions—the whole gambit of personnel management relationships.

The Bureau then prepares reports which ultimately go to the head of the agency and which tell him whether we think he's done well or poorly. These reports are fairly detailed. They give the agency head statistics on what's happening, they give him names, and they give him a lot of information.

In order to buttress our findings so that he will realize that we're serious about this and we really have found something deserves correction, somewhere along the way on the basis of a draft of that report, before it is finalized, there are meetings with the agencies, close out sessions, so called, and we try to make the agency shape up in this fashion.

Ultimately there is that final report with attachments, which does buttress why we felt the way we did. We think that over the years this effort has been relatively successful. We constantly try to improve it, but that's the nature of the kind of thing it is.

Robert Vaughn asked us for a number of these reports. I forget his precise description of what he wanted, but it runs back some years. We declined to furnish the requested reports, and the matter went on appeal in the Commission. I did consult then with the Department of Justice. They did not make the decision, but I feel assured, as a result of their review, that we have at least a respectable position, if not a winning one.

And so we decided that this matter is important enough to us to go to court about it. Now I am not an authorized spokesman for the Department of Justice. And as everybody should know, you don't lightly talk about litigation that's pending, and I don't intend in telling you about this, to be commenting on the litigation. It hasn't gone very far yet, so fortunately it's difficult to tie in.

But the problem that's presented, which is what Ron wanted me to pitch to you, is simply this. We now have the facility for walking into an agency and talking to employees, union people and others—we talk to a lot of people—in order to try and discover what's going on. We currently have rather ready access to any records that are in the establishment.

So that when we then walk in, we know that we can get an adverse action report and a lot of internal data, some of which agencies don't invariably keep, but very often there are self-conscious memoranda that we see in the files of which we can take advantage.

If the reports that contain the evidence of this information are made public, our fear is that our sources of useful information will dry up; that agencies will perhaps not be as cooperative as they are; and that we may not get to see all the records that we need to see.

My feeling about this is not very strong. I rely—I think we all have to rely—on what the court's do in the Freedom of Information area; and I'm perfectly happy if the court looks at our arguments for withholding and ultimately says, "No, those have got to be disclosed."

It may be that the effect of such a decision would be to kill off the utility of the evaluation exercise. We might get a lot less information and be less able to correct deficiencies. But that's something that we are all going to have to reckon with in the future.

If we're right, and the courts so hold, then the effort for going out for a corrective exercise will not be jeopardized.

That strikes me as being the issue with respect to these reports. And on that note I'll stop.

Mr. PLESSER. First, I'd like Peter Shuck to respond.

Mr. SCHUCK. I have two quick points. First of all, he says that I stated that the political officials are venal. I didn't state that, nor do I believe that. What I did state was rather that unremarkable proposition that political officials are political, that is, that their interests may frequently diverge from those of the public. It is precisely that problem that we are discussing today. I think it is a self-evident proposition.

Secondly, he points to the Code of Federal Regulations as evidence of the way in which the Act is operating. I think that the reality of bureaucratic life is no more found in the Code of Federal Regulations than the reality of moral life is found in the Bible.

And that again, is precisely why we are here today, because the realities have diverged so greatly.

Mr. PLESSER. In talking about the Personnel Evaluation Reports . . . unfortunately, I don't see Bob Vaughn in the audience, he was going to try and come.

I feel that I shouldn't respond because I am representing Mr. Vaughn. Mr. Morrison would not mind just talking about some of the policy reasons why we brought this action. I think it would explain our position fairly well. Mr. Morrison is an attorney also associated with us.

ALAN B. MORRISON. I hadn't planned on speaking so you will excuse me if my remarks are somewhat less organized than I would have hoped.

As a former Assistant U.S. Attorney myself, I am familiar with some of the problems that you are encountering. And the kind of fears that you've suggested are the kinds of fears that are very difficult to substantiate on one side or the other.

And in our view, the Freedom of Information Act has taken the view that many of these fears which existed and prohibited the disclosure of information and existed in practice for so many years are really not well-founded and could be dispelled.

I think that our concern in this particular case, in the particular lawsuit, is that we want to try and measure the performance of these suggestions which you have been making to the various agencies and what the agencies themselves are actually doing. And there is no way for the public to be able to try and make that sort of check without having the document which forms the basis of the criticism.

It seems to us that its a very important case from our point of view too because these are the very kinds of documents in which either an agency itself or another agency, such as the Civil Service Commission has undertaken a kind of critical analysis that the ordinary citizen would not have the time or the expertise or accessibility to do.

And when that kind of document is made available, as in some respects Peter Schuck's civil rights investigation reports, those kind of documents are enormously valuable to the citizen trying to measure how his government is performing tasks.

Obviously it will be up to the court to decide whether the specific seven or eight exemptions apply or not, and not because the court is not left with the task to try to decide whether or not this will interfere with the operation of the Civil Service Commission or anybody else.

The courts have said those questions are irrelevant, as has the Congress. We'll have to see whether one of the enumerated exemptions apply or whether it doesn't. And of course, it seems to us always that if a particular outcome of a particular case is so egregious that the entire operation of an agency must crumble, and of course the agency is in part in a better position to go to the Congress and say, "We need one specific item of help" than a private citizen would be saying, "I need one specific item of information."

Mr. PLESSER. Okay. Then why don't we continue with the panel and then we can have extensive question and answer.

Mr. WILLIAM DOBROVIR. Fellow servants of the public interest: I am going to state a startling proposition—that the interest of the United States is served when justice is done to its citizens in the courts. I don't know if anybody recognizes that statement. It happens to be emblazoned above the Department of Justice in concrete where, I fear, in terms of the operation of the Department of Justice, it remains.

I'm going to talk about Freedom of Information from the point of view of the litigator. I am not going to discuss the question of whether public officials are, or are not, venal or whether or not they have a specific vested interest in secrecy and disclosure. These are all matters which have been rather well covered. I want to suggest remedies for this problem.

One remedy, which I will suggest to Mr. Mondello, is that public officials who deny a request for a document which denial is then reversed by the courts, should be subject to some personnel sanction; perhaps a notation in their person-

nel record that their denial of this document, which then went to litigation, cost the United States of American X thousand dollars, in terms of lawyer's time and expenses of litigation.

In the dark of the night I sometimes think that it might be a good idea to revive the stocks. [Laughter.]

But I'd like to talk rather about the Department of Justice. Of course, it is hard for an opponent or an adversary to know how the process works within the Department of Justice. But the impression that one gets at least from seeing the pleadings that are often filed in litigated cases, is that the Department of Justice is not observing the motto which stands above its building.

We find, for example, that cases are unconscionably delayed. A little study I did of some thirty odd dockets in the U.S. District Court for the District of Columbia, showed that the government takes . . . an average of 67 days to file any responsive pleading in a case. We're not even talking about an answer. In many cases, no answer is ever filed and the cases are litigated by motions to dismiss or motions for summary judgment.

We have attempted from time to time to get a court to cut down the government's time to respond, arguing that since this matter has been now considered on at least two levels of the agency, the agency has certainly solidified its position. The agency has already stated in its responses what provisions of the Act it relies on as exempting the documents. The Department of Justice, we modestly suggest, really doesn't need more than perhaps thirty days to determine whether or not those defenses are or are not well founded.

The Department of Justice uniformly resists such attempts, despite the fact that the Act itself provides expressly that matters of the Freedom of Information Act take precedence in the court docket and are to be expedited in every way. But the Department of Justice does not believe apparently, that "every way" applies to it. In effect then, this provision in the statute has proved hollow. Suggestions have been made that the Congress should enact a specific provision saying that the Department of Justice has only 20 or 30 days, or some shorter period of time, in which to answer. How we get around the problem of the Department of Justice's usually habitual motions for extension of time is something that the courts will just simply have to resolve as they come up.

Now a second problem that we see in litigating these cases are defenses that . . . well, I have been accused often in litigation, of exaggerating and of taking extreme positions. In a case . . . in a hearing recently in a District Court, in another case, not a Freedom of Information Act case, the U.S. attorney in an attempt to . . . a U.S. attorney referred to me as a forceful advocate. What he really was saying was, to the judge, "You don't have to listen to him, you know he always exaggerates." So perhaps I'm going to exaggerate a bit, but defenses are made which one finds it hard to believe are made in good faith.

For example, in one case which involved reports filed by Federal Inspectors of safety and health conditions in plants in which government contracts were being performed, the case of *Wechsler v. Schultz*, which Mr. Plessner mentioned, the Department of Justice interposed in a defense something that admittedly was not an exemption under the Act. They said, that if this information were made public it would inhibit inspector's access to the plants, that the employers would shut the doors and wouldn't let them in.

I'm not joking. This defense was made. Our response was, "Well, they have statutory power to go into the plants, and if they're not let into the plants, the agency can cut off the contract."

As I said, I found it hard to believe that that defense was really asserted in good faith. Now I don't know whether it was proposed by the agency or dreamed up by the Department of Justice. But I would say, that if the suggestion came from the agency, in my view the Department of Justice had an obligation to tell the agency that that is not the kind of defense that the statute permits.

Other statements that were made in that particular litigation were that the inspectors' reports normally (and I am quoting) contain findings and conclusions and that they frequently (and I am quoting) contain recommendations about enforcement.

Documents that contain this kind of material may or may not be exempt under the Act, and I don't want to debate that point, but when finally we agreed that the courts should read a batch of these documents, *in-camera*, the judge called us in after having read a sample of documents. He said, "There's nothing in this, this is just inspectors saying, well, you know there's a grease spot on the floor and so forth and so on." He said, "we're going to grant access to all of these files,

and if the government has any specific objection to the disclosure of any specific document on the grounds that its covered by any exemption, I'll listen to it."

Well, the documents were made available eventually. It took sometime for the message to get out to the field and we had to keep calling up the Department of Justice lawyer, saying, for example, "The St. Louis office is not letting our people in to read the documents." The lawyer would call and the St. Louis office would then be opened up.

But I don't recall that an objection was raised as to any single one of these thousands of inspectors' reports.

Another example of what I consider to be non-good faith defenses, which I think the Department of Justice has an obligation to concern itself with, is in a case I litigated on behalf of an anti-war veteran's group. The anti-war veteran's group wanted the same access to lists of discharged veterans, current discharged veterans, which the Veterans Administration makes available to the American Legion and the Veterans of Foreign Wars and the Disabled American Veterans.

We said, they're a veteran's group, we're a veteran's group. They use these lists to recruit members, we want to use them to recruit members, we'll pay whatever they pay. It turned out they didn't pay anything. The lists were made available to the American Legion and others on computer tape reels and were mailed out under FRANK to the various veteran's groups which then ran them off on their addressograph machines and sent out their message to the veterans and then sent the reels back.

The Veterans Administration defended, first of all, on the ground that these documents contained personnel information which if disclosed would affect the personal privacy of the individuals. We responded, "You've got to be kidding, you send this to other people, so their personal privacy has already been invaded." Then they switched their ground and said, "Well, we send this to these agencies because they help us, they process veterans claims." To which we responded, we're a veteran's organization, and we're going to do the same thing that they do, we're going to process claims too. Just a different constituency of veterans. So they shifted their ground again and said, "Well, those organizations are chartered by the Congress." At which point we said, "We don't understand that that makes any difference," and we won the case.

But it took a long time. It took the expenditure of thousands of dollars of lawyers time. And this was a case which never should have gotten to court. This was a case in which the Justice Department should have looked at the thing and said, "You don't have a leg to stand on, you give this stuff to the American Legion, you've got to give it to everybody."

Another problem which I want to talk about in a non-contentious way and which I think we all should be concerned with, we lawyers, and I hope that perhaps we can have some sensible debate on this, is the whole problem of *in camera* inspection. This is becoming a fairly normal technique in Freedom of Information cases.

The agency will provide the documents to the judge and the judge will read them in his chambers and then he will decide whether or not he thinks the documents are exempt. If he thinks they are, he so rules and dismisses the case or finds for the defendants. If he thinks they're not, he orders that the documents should be disclosed. This, for example, is what happened in our *Walsh-Healey* case.

I am terribly disturbed about judges doing things *in-camera*. Its not the way our judicial system should operate. Its not the way our country should operate.

I remember another case which I litigated on behalf of two members of Congress in which we were seeking the undisclosed portions of the Pentagon Papers. Judge Gesell, the judge in this case, has made an outstanding record, perhaps the most outstanding record of any District judge in the last five years, since his appointment. He's so good that even when he decides against you, you think he's right. [Laughter.]

I was urging very vigorously that at least he ought to read these diplomatic volumes and decide himself whether or not they were entitled to exemption as state secrets. And he exoressed this idea. This idea I'm expressing is not original with me.

It was obviously a deeply felt view which impressed me immensely and still does, that this isn't the way our system should function.

I have in several cases filed requests that documents be provided to the judge *in-camera* and also supplied to counsel for both sides under a protective order that would prevent counsel from making any disclosure of these documents. I think that would be better. At least the adversary process would be able to work,

and you could file memoranda which would be under seal, and the judge would read the memoranda.

But that troubles me too, in fact, that perhaps troubles me more, because then you have not only the judge but a whole judicial process operating in secret. And I don't like that.

Now I can't find a solution to this problem. But then I receive pleadings for example, as in one case which is presently under litigation and therefore I won't mention it, but in which the defense is that the documents contain trade secrets and/or information which is privileged or confidential (stated in these words). And the only support that is applied for this is an affidavit from the official of the agency which says, and I quote, "The documents contain trade secrets and/or privileged or confidential information." Its very difficult to figure out how that matter can be decided because presumably a conclusory affidavit of that kind is insufficient. It can't be challenged by us, it can't be probed by us, and the judge certainly doesn't have enough information to decide whether or not in fact the documents contain this information. All he has is a conclusion of law under oath. Now, unless he is actually given the document and decides himself, I don't know how that case is going to be decided.

I would suggest that perhaps more information about what these trade secrets consist of, what this privileged and confidential information consists of, would be helpful. It might for example be a secret process for the manufacture of some industrial product. If it is a secret process for the manufacture of an industrial product, that could be stated in the affidavit and maybe we'd be stuck. Maybe we'd lose. But at the moment we have no idea what the thing may be.

I would like to respond briefly to a couple of things that were said by previous speakers.

First of all as to the question of the agencies of the Executive Office of the President, there is at least one decision, *Soucie vs. David* in our Court of Appeals, which held that the Office of Science and Technology, albeit part of the Executive Office of the President, was an agency and was covered by the Act and required to disclose.

Mr. Mondello's fear that sources of information may dry up prompts the same reaction I had to the similar allegation that was made in the Walsh-Healey case, and it's really simply this, that this position is that agencies will stop obeying the law if their activities are made public. If that's true then maybe the solution is not to keep their activities secret, but something perhaps a little more deeper in terms of changing the way the people in the agencies think.

As to the Department of Agriculture, I don't know if the Department of Agriculture has anybody here, but all of us who are in this field have probably developed a sense of paranoia about the Department of Agriculture. Everytime they turn around, they're closing a door. It becomes increasingly impossible to get anything out of them. I suppose one of the reasons is that it's a great big agency and they make a lot of mistakes and they like to cover them up. But perhaps the Department of Agriculture representative here can respond to that.

And finally, I guess, this is unfair, but I often say things that are unfair—Mr. Mondello referred to the fact that he was impressed with the openness in his agency. I find that startling from a representative of the agency which has been litigating a case for two years trying to prevent Mr. Fitzgerald from getting an open hearing on why he was discharged from his job. [Applause.]

Mr. SAMUEL ARCHIBALD. Being the last of these five panelists, I'm in the fortunate position of being able to disagree with all of them. But I'm in the surprising position for me of finding myself not disagreeing completely with the government lawyer.

I found that some of the things said made sense. I found myself shaking my head in agreement when Mr. Gilliat of the Defense Department was shaking his head in agreement. I don't mean to say, of course, that everything they said is marvelous, true and understandable.

I've been in the position, over the years, of overstating the case to try and embarrass the government and usually the government lawyers. This time I don't have to overstate the case: it's been done for me. [Laughter.]

Sorry about that. Today is a very important anniversary, five years, eleven weeks, and three days ago there was a signing ceremony on the Pedernales, and its no coincidence that Lyndon B. Johnson, of whom many of you have read, signed the Freedom of Information law on the 190th Anniversary of the Declaration of Independence.

Now I don't mean to imply that that ceremony on the Pedernales was as important as the ceremony in Independence Hall, although Mr. Johnson might think so.

The period since the signing ceremony on the Pedernales, the period since the Freedom of Information law became effective, has been called in the report of the Moorhead Sub-Committee five years for footdragging by the bureaucracy. That's true. That's absolutely true.

No agency, no witness representing any agency, supported the legislation which became the Freedom of Information law. All of them were in favor of the principle of the people's right to know, none in favor of the practice.

Therefore, it's not surprising at all that all of the agencies are reluctant to give any but the most narrow interpretation to the regulations administering the law which they opposed.

In addition, however, to five years of footdragging, there has also been five years of freedom from criticism by the Congress and the press. But that honeymoon is over.

For those five years the press made very little use of the Freedom of Information Act. There were, in the first four years, nine hundred and twenty-two cases administratively appealed throughout the government—administrative appeals of initial refusals of information.

Six hundred and forty of those appeals were filed by corporations or private lawyers representing private interests. Only 90 of those appeals were filed by the press.

Of course, there is another fact I hasten to bring up—only 35 of the appeals were filed by public interest lawyers. Come to think of it, in spite of some of the public interest lawyers' disaffection with this law, if it didn't exist there'd be no Nader operation such as you see today.

They wouldn't have the tool that they have to get at information, to disclose the shortcomings, to do the wonderful job that they are doing. They operate as effectively as they do today, I think, partly because of this law.

Based on these figures and on the facts of real life, the Freedom of Information law is being used largely by private interests who want public records for personal gain. That's not surprising to anybody who knows the real world, anybody who has gone beyond high school civics.

Nor is it surprising that the press has not made major use of the law. The users of the law in the press—the reporters and editors who would be expected to dig out the information and print it—never did support the law.

Organizations of editors, publishers, and similar establishment groups were the vocal supporters of the law, as it was going through Congress, not individual reporters. For a Washington reporter to admit that he needs help in getting the facts of government means that he must admit that he really can't do his job, without some sort of help.

So it's understandable that the reporters didn't support the law, but not as understandable as they aren't using it. That five years honeymoon is over, however. The Moorhead Sub-Committee hearings proved that.

The hearings this year by the Moorhead Sub-Committee have been a more careful study of government information problems than at any time since the Democratic Kennedy Administration and the Democratic Congress shared the brief authority of government.

And the press is beginning to use the law more and more and more effectively. For example, the *Arizona Republic* used the administrative appeal procedures against the Social Security Administration. The *Tombstone Epitaph* used it against the Forest Service. The *Detroit Free Press*, among others, used it against the Department of Agriculture.

The *Philadelphia Enquirer* and the *Nashville Tennessean* are two news organizations which have gone to court and effectively used the law. Even the *New York Times* is considering going to court under the law.

But the important thing is not the increasing press use of the law and Congress' increasing oversight of maladministration. The important thing is how the press is using the law, and is going to use it much, much more in the immediate future.

In each case where the press uses the law, they also print dozens of stories about silly government secrecy. In fact, I've helped float many of those stories and will continue to do so.

In every case the final story, when the public record is broken loose, is not nearly as bad, not nearly as damaging, to the credibility of the government agencies, as the secrecy stories that preceded the final story.

That point has been made by others here on both sides of the controversy—that when the final story was put out, nobody got hurt, the walls of government did not crumble.

I am absolutely certain that this bad government publicity would not have happened if the government public information officer had been made a part of the Freedom of Information process.

The five year honeymoon is over. You're going to be hit with formal appeals, court suits and other actions from the press and you're going to be hit with more and more bad publicity.

That means you must give more thought to the positive flow of information, to the job of your public information officer, instead of the negative problem of restricting access. That's the government information problem that must be solved in the next five years. I'm confident that the Moorhead hearings and the report which came out of those hearings is a big step in that direction. I also know that this exchange of information we're having here today is going to help move in the direction of a serious consideration of the need to improve the positive flow of government information. [Applause.]

Mr. PLESSER. Thank you very much. May I suggest . . . I'd like to continue, but I think we've all been sitting down since a quarter of ten, and if we can take maybe just a five minute break, to kind of stretch and walk around, then we can come back about five minutes from now.

[Recess.]

Mr. PLESSER. Before we open up the floor discussion and this is what we want to do, I would like to give Mr. Mondello and Mr. Saloschin a chance to very briefly respond to some of the comments that were made this morning. I think they have some things to say.

Mr. MONDELLO. I don't feel I have to make a response to some of the things that were said. But I did want to comment on *in camera* inspection.

I have the same uneasy feeling that Mr. Dobrovir has about it. In a case between private parties some time ago, the *Carl Zeiss-Jena* case in the Court of Appeals in D.C., we had a problem where counsel wanted some Government documents which he sought under Rule 34 of the Federal Rules of Civil Procedure. We looked at the documents and found that some of them were trade secret data and some were internal documents of the Department of Justice. We made something like several thousand documents available, after a very persistent search through our files to make sure we had gotten everything.

We came out with a residue, my staff did, of about 400 documents they said were critical and could not be released. I had to personally examine those, and I resolved it down to about 49 documents I thought not disclosable and on which I consulted with the Attorney General. It was Katzenbach at the time. He agreed with me, after looking them over personally too. The thrust from the people requesting the documents was to have *in camera* inspection. We thought that was a bad idea. I think we felt an uneasiness that a judicial secret process was not a good way to solve any of those problems.

And I think this uneasiness is common to Freedom of Information Act problems. I don't think a judge would cherish the idea of being the single individual responsible for reading these documents and telling both sides who couldn't see the documents, that they could, or couldn't be had.

So what we did was, we concocted an affidavit, signed personally by the Attorney General (because in the *Reynolds* case there was the suggestion that a cabinet officer himself ought to personally make this decision) which tried very hard to bring the court as close as we could to the contents of the documents without actually disclosing them.

We described the kinds of documentation they were, the kinds of things that were stated, right down to telling the court that one of the documents, the so-called internal document in the Department of Justice, was a recommendation from somebody in the department to somebody else . . . I think to the Solicitor General, . . . as to whether or not the case should be appealed.

And the Attorney General in the affidavit commented that it is characteristic in these documents for us to write, sometimes disparagingly, about the efforts of district judges in deciding a case, and that we wanted to feel free to be open and discuss such things, and it was not the kind of thing that judges should look at after the event.

That was one kind of document that was in there, and we ran thru the same course on all of the other documents. That affidavit was accepted. We didn't have to disclose any of the 49 documents.

I'm not suggesting that this is a sure way out of this problem, but the notion that the judge should not get involved *in camera* is far preferable to me than involving him in that way.

I tend to agree with Dobrovir on that.

Mr. PLESSER. Mr. Saloschin.

Mr. SALOSCHIN. Well, I'm very glad that Tony dealt with the question of *in camera* inspection so that I don't have to deal with it. But it's one of the most difficult questions in the area.

I might say that there are Justice Department Freedom of Information litigators who feel the same way as Mr. Dobrovir, or at least who share one of Mr. Dobrovir's thoughts on this subject.

I do however, want to respond briefly to another point that Mr. Dobrovir made and that is the question of delay in litigation.

Now I came here prepared to say something about delay in the administration of the Freedom of Information Act in the agencies and I think I did comment on that in my original remarks.

I feel that really you . . . on this question of delay in litigation, and if it could have been anticipated, perhaps the Justice Department should have been represented here by a litigator and I am not a litigator.

However, I can say this, that the Civil Division lawyers who handle these cases and I would assume that this would also be true of the Tax Division lawyers who handle cases when Internal Revenue records are sought under the Freedom of Information Act. But of course, I am most familiar with the Civil Division lawyers.

These people are so busy that they . . . their pace and their workload is such that most of us just wouldn't want to bear it as a steady thing. Maybe that accounts for the fact that they're not here today . . . I often have a problem in getting them to come to a Freedom of Information Committee meeting because of the pressure of their caseloads in litigation.

So I feel, in their absence, I should point out that some of the same manpower problems that may affect the administration of the Act, may also be involved in the litigation.

Of course some of the delay in litigation may not be due to counsel for either side, may be due to the tribunal itself. I would close only with the thought that there is an excellent article on the whole subject of delay in the latest issue of the *American Bar Association Journal* which was written by Roger Cramton, the head of this Office, and perhaps we could look at that, in considering the question of delay.

Mr. PLESSER. Thank you. I would like now to entertain any questions, comments from the floor. Mr. Morrison.

Mr. MORRISON. I'll briefly respond to the last remark of Mr. Saloschin. In my four years as an Assistant U.S. Attorney in New York City, I think we probably had as great a caseload as any Department of Justice attorney has, and I found, and I also found it true of my colleagues in the Justice Department, that the problem in answering a complaint was not in sitting down and writing the answer, that can be done in fifteen minutes by any attorney who has any skill at all.

The problem is getting the litigation report from the agencies. And when the agencies have already supposedly gone through two levels of administrative proceedings before turning down a request, it seems to me to be unconscionable that the report isn't over there within two weeks after the complaint is filed.

Either they've got their reasons, or they haven't got their reasons. And there is no reason why that report can't be to the Justice Dept. and that it is then quickly sent over to the U.S. Attorney or the answer quickly filed by somebody in the Justice Department. And I think that's the real bottleneck and it's not the overworking of the assistant U.S. Attorneys or the Civil or Tax Division attorneys handling the case. That's the real problem.

Mr. ROBERT BEATTY, Ass't Secretary for Public Affairs for the Department of Health, Education and Welfare. I am also a presidential appointee.

The administration of the Freedom of Information Act, the overall administration of it, in HEW comes under my general supervision. Its been very interesting to me this morning to be a part of a forum for the Center for Responsive Law. I've been sometimes thinking this morning it would be nice to start an organization called the Center for Responsive Public Affairs.

I think in looking over the attendance list that the sessions have here today, I was gratified to find that there is a fair representation of public information . . . affairs people at this session. Although I am impressed by the fact that

most of the conversation and discussion of the Freedom of Information Act and its inadequacies or adequacies seem to revolve around some of the technical legal aspects of litigation involved with some of the failures of the Act to perform in the way that some of the citizenry would like to see it performed.

Let me just say this, about my own observations of it, in at least one large department of the federal government. My impressions are and again I'm not a long time student of performance of government under Freedom of Information Act but I do feel that as Sam Archibald and others have indicated here today, that there has been . . . we're completely overlooking the effective parts of the . . . the results of the Act that have actually encouraged and resulted in much more flow of information from government than otherwise might have occurred.

It's a little bit . . . nobody I think would claim in government today that the Act is working perfectly. I think one of the reasons that it is not working better in terms of making information available is, because in some departments of government there is a tendency to put the administration of it in the hands of our good friends in the legal side of things, rather than the Public Information or the Public Affairs side of things.

Very happily in HEW we work very closely together and I think this kind of working together, has to come about in the administration of the Act. But its been my observation over the years that there is a natural tendency on the part of lawyers to almost automatically when in doubt say "no", and a natural tendency on the part of Public Information people to almost automatically when in doubt, say "yes", when it comes to requests for information.

Now somewhere in between obviously there has to be a consensus on this. And I only . . . I guess I sort of represent the Public Affairs or Public Information side of this issue and only plea that . . . and have pled before the Congressman's Moorhead's Committee that the Public Information and Public Affairs people in government, be given the central responsibility for the administration of the Act, for making the policy decisions, in collaboration obviously, with their legal counsel on whether or not information should be released.

In HEW we've had a pretty fair record I think over the years and the whole attitude as again, exemplified by the most recent sort of change of heart of one of HEW's agencies, the FDA. The whole attitude has been one of "when in doubt, try to make the information available," I think it's a matter of attitudes.

All the amendments to the law, the changes in the law, the law itself I think are useless if the people and those of you in the Center of Responsive Law who condemn them, the footdragging bureaucracy whether they are footdragging or not doesn't make too much difference. They are people who are going to be administering this law for a long time to come.

And my judgment's are that they respond . . . and people generally respond better and their attitudes toward it are better if they understand and are not totally condemned for bad faith in the administration of the law. I think these situations occur. I think there's a tendency, when there is an abuse of the law, to generalize and say, that everybody administering the Freedom of Information Act in government are a bunch of footdragging bureaucrats that are trying to keep the public from knowing what they ought to know about government.

And I deplore that kind of an attitude toward the situation as exists in government. I for one, have been trying very hard through the time I've been in HEW to encourage a freer flow of information.

I think there's much more to just the release of documents in this case, in terms of the types of government and the quality of government information involved. I hope then that we can take that up with the Moorhead Committee at a later date but I guess I just sort of had to stand up here and add a little rhetoric in defense of the public information and public affairs role in the administration of this important Act.

Mr. PLESSER. Thank you. [Applause.]

Mr. ARCHIBALD. May I add one brief point? Ass't Secretary Beatty is a lonely man. He is the only Assistant Secretary in the whole U.S. government who has any part in the administration of the Freedom of Information law.

He is one of the few public information officials who has taken on the internal fight necessary to force the view of the public access people on the administrators. We have had a sort of incorrect view today of how the government information system works because we've heard from people like Bob Saloschin and Tony Mondello who are the good guys, who are the ones who are doing everything possible to make things public, to make public records available.

They are the type of government lawyers who, in most cases, work with the information people and, in all cases, recognize the public's need for information. But this is not the complete picture. In the Departments of Agriculture, Labor, Interior and Treasury, in the FCC, the IRS, the FPC, and most of the Dept. of Defense, there is no public information officer participating in decisions on the Freedom of Information law.

Now I don't mean to imply that in all the other agencies there is; these are the only ones I know about. This is part of the problem and this is the problem to which Secretary Beatty was addressing himself—the need for a flow of positive information instead of just fighting the negative problem.

VIRGINIA HART, Interior Dept. I did want to take issue a bit with Sam Archibald's allegation that Interior's Information Office is . . . does not have any input, it's a very new kind of input I might say, and it's thanks in good bit to the reactivation of the Congressional interest in the Freedom of Information Act.

But I want to take this public opportunity to correct any impression I might have conveyed in my last remark which was that our solicitor is not cooperating. Our associate solicitor is present today and I want to say thank you to him for helping us to have an input in the last few months.

Mr. ARCHIBALD. I'm glad things have changed in the Dept. of Interior, Virginia. My comments were based upon the sworn. . .

VIRGINIA HART. Changing. . .

Mr. ARCHIBALD. Changing. I beg your pardon.

Mr. MARTIN. HEW. Mr. Mondello at the break make . . . made a comment to me that leads me to feel that the comment I made earlier may have been misinterpreted.

I did not in my comments about Mr. Saloschin's remarks, mean to put the blame, whatever blame should be put, on failure of responsiveness by the executive branch to the Freedom of Information Act, on lawyers.

What I meant to make clear was that, that he refers to policy grounds of objection to release of information. A ground not provided for in the Act. Suggests that the decision environment in which issues as to whether or not to disclose information, are considered, find that ground of decision relevant, and actively pursued.

Evidently not when Mr. Mondello is involved because his remarks portray a view of the Act in its interpretation that seems more sharply to make clear that that is not a relevant ground.

Lawyers are either in charge of their clients or trying to do what their clients want to do. And I think that its always been true and always will be true that political officials and civil servants will, I think, in . . . often in very conscientious efforts to serve the public interest feel that certain information should not be disclosed.

The right to know, like the right to privacy, are two kinds of social technology. Each of which, it seems to me, is subject to potential abuse. I don't think anyone argues and the Act itself recognizes that the right to know, is not desirably absolute, it protects a range of kinds of information out of a concern, presumably, for public interest.

The Act strives to strike a balance between the public's right to know and the public's right, if you will, it's benefit in not to know, or not knowing at a certain time, or not knowing under certain circumstances.

And I think that there is some risk in the discussion of this subject in developing a kind of polar view that secrecy is good, or that openness is good. It seems to me that they are both medicine which must be carefully prescribed, which are sometimes good and sometimes bad, depending upon the situation.

Mr. PLESSER. Thank you.

Mr. MONDELLO. You make a point, I think, that maybe didn't come out too strong, but I feel it, and I'd like to say it.

I tend not to see our affairs in terms of good guys and bad guys and I don't think we're settling anything for all time. I still keep the dream of a society where someday it'll be both practicable and profitable for the conference that the nine justices of the Supreme Court hold before they decide a case to be held on Channel 26.

That doesn't happen and you know what would happen if you were to ask for a record of that proceeding. You just couldn't get it. And I think society at the moment is so constituted that it wouldn't be advisable for that kind of information to be publicly broadcast.

The court at the moment has difficulty enough just agreeing on what it will say publicly in its decisions, much less what goes on behind the scenes.

And Ron Plessler, it's not just the Supreme Court. Ron Plessler said to you just today, "Well, this fellow told me this in confidence," so he's respecting that confidence. Not every thing is something that the public is entitled to know at every point in history.

What we're doing now is making the accommodations that currently are tolerable and wise. Obviously there's a direction in which we should go—toward greater disclosure—as President Madison described it a long time ago in the history of this country. I think we're getting there. We're getting pushed, perhaps faster or slower than some like to see us pushed but the movement is underway. We are making the accommodations that can be made today. We're not doing it to last forever, and we shouldn't be judged on that basis. [Applause.]

Mr. HOWARD SELTZER of the Office of Consumer Services at HEW. I'd like to make an observation that it's my understanding that the recent rather dramatic change in FDA's policy on making information more readily available, came about at least in part because of the series of informal but regular meetings of the Commissioner and his immediate staff, have been having with consumer and public interest representatives.

I'd like to suggest that this kind of consumer or citizen or public interest participation and other agencies in other fields may have an effect and I'm not sure that it does, but I have often wondered whether a court would see that it might.

Mr. PLESSER. I'd like to respond to the first part of your comments, and then Mr. Dobrovir will respond to the second part.

First as far as having public interchange in the policy making processes, this is obviously I think one of the things that we're trying to do here today. My job I think most of you know, is a litigator for the Center for Study of Responsive Law, and my job is to bring cases into court, and I have.

But we thought that it would be worthwhile to take a day out, so that we could talk and see what the problems were and give you input coming back to us.

If any of the agencies would desire a kind of informal discussion of problems, we would be most happy to discuss it. We don't like to go to court anymore than anyone else does. If litigation can be avoided through policy making decisions and through what we feel is a broader application of the Freedom of Information Act, that will be a desired goal.

I'm going to have to respond to almost as a matter of pride to what certain people have said about the FDA, and what a revolutionary change the FDA has gone through in its Freedom of Information Act regulations.

Since we've been on record disagreeing with them, I feel that I have to state our position. While it does show, I think, a significant turnaround, and shows an attempt by the FDA to comply with the Freedom of Information Act. However, the fact that NDA's, IND's and most of the very critical animal and clinical testing data is still unavailable indicates no real change at all.

This information is not made public by the new regulations, and we feel that the new regulations to a certain extent, while good, are not nearly good enough because they don't really go to the information that is very, very important. One other point. I think the public interest groups did have some input into the Freedom of Information Act changes by FDA. I would also suggest that the Moorhead Committee and a case presently in litigation entitled *Morgan vs. FDA* had a lot to do with the change in those regulations.

Mr. DOBROVIR. I'm not sure I understood the latter part of your question. Correct me if I misstate it. I understood the question to be—where information is supposed to be disseminated to an agency's constituency or clientele, general information about what the agency . . . the services that the agency is supposed to provide and it doesn't get out to them because of some block somewhere in the administrative process. Does the Freedom of Information Act deal with this problem?

No. The Freedom of Information Act is intended only to provide a remedy for a citizen who himself asks for . . . wants and asks for a specific identifiable document or category of documents.

It's an inquiry generated by the citizen which the Act deals with.

Mr. PLESSER. As is always the case with lawyers, we have a dissenting opinion.

Mr. MONDELLO. If I understood your question and you can tell me too if I'm wrong, I think the Freedom of Information Act has provisions in it that require agencies to put an awful lot of information out to the public.

And there should be no case where any part of an agency's constituency doesn't know what on earth its doing or how you go about getting benefits. The early part of the Public Information Act, not the part generally that we've been talk-

ing about this morning, and I agree with Bill's response as to that . . . the early part in subsection (a) of 5 U.S.C. 552 has requirements that agencies have to publish certain things in the Federal Register and elsewhere, and make it available, even down to the rules they follow in dispensing benefits; so that within your own agency I think you men ought to go to your lawyers and remind them that 5 U.S.C. 552(a) places them under an obligation to get the word out—they can't just sit on their hands.

Mr. PLESSER. Thank you.

Mr. JOHN COLEMAN, Public Information Officer with the Office of Emergency Preparedness. I've been there for about eight years and about six directors. I wanted to make a couple of random comments from a public information standpoint.

I wrote this one thing down because on the door of my room I've got a photo we clipped out of some place. There are six or seven dumbfounded geese looking at a sign that's either written in Russian or hieroglyphics.

The caption under it, as I recall, says, "OEP Public Information Officers Studying Input to Them From the General Counsel's Office and the Oral Import's Specialist for Tomorrow's Press Release." [Laughter.]

Well, I'd like to suggest that . . . and I'm probably outnumbered here . . . that just like doctor's do, their prescriptions are in Latin. You people the lawyers who we deal with, couch their terminology in WHEREAS's and THEREFORE's.

I'd like to compliment Mr. Beatty who just left probably, and I hadn't met him before in the fact that suggesting as Sam Archibald did, that PIO's do be included. Sometimes we are not included in decisions . . . policy decisions of the agencies. Maybe that's partly our own fault because in some instances, and I am being facetious, we do either dress a little too flashy or a little downtrodden. Sometimes have a notebook in our pocket.

So maybe it's a combination of flashy, downtrodden. And therefore, we resemble the press. [Laughter.]

I've always thought of the press as a friend of all of us. And I think that if you do draw us in even though . . . people still walk past us coming out of the elevator and say, "There they are," and "What are they up to now?" And we have a lot of action when there's a disaster too.

But the point I guess that I wanted to make was I think that we too, couch our terminology in something else, and that's called "journalese," we are paid quite a bit of money to help reach the people and supposedly we're at the shoulder of the director.

And as I said, I've served under six of them now. And he should be able to look to the public affairs officer and the general counsel and say, "What's the public going to do to us if we let this out?"

And if he goofs up too many times, get rid of him. If he says, "Gee, there's nothing wrong with this," and I agree with Mr. Beatty and the lady up there who said earlier that lawyers have a tendency to want to conceal it whereas the information guy acting as an ombudsman, wants to let it out.

So Mr. Archibald let's include the PIO in. Thank you.

Mr. PLESSER. Thank you. I'd like to make one comment, and I'm sure Mr. Schuck would like to make a comment also.

Unfortunately you know we're not in a position to do it. I think one of the things maybe that the public information officer and the general counsels and the people who are responsible for regulations are attending this meeting can bring back with them.

It seems to be one of the recurring ideas that have been coming out of this meeting that there is a need for public information officers to have a policy making decision, involved. And I think they need a different position than in most cases they have today.

I think what Mr. Archibald was saying before in response to Mr. Beatty was that Mr. Beatty has a powerful position and can do something, he has a substantive job. Most, fortunately, I think public information people don't really have a substantive job. As you said, they are at the shoulders of the director.

We would . . . and they really don't have power to release or not release and if this can be changed, and I can only throw it back to you, and say that, you know, you are the people who have to get . . . go back to the agencies and work for this, if this is something both from general counsel and from the public information point of view, if you think that this is a goal that's worthwhile.

Mr. SCHUCK. Let me play the unregenerate pedagogue for a moment and try to narrow the focus of discussion somewhat because I think a number of issues are being discussed which aren't really issues.

First of all, the issue of whether it's appropriate under certain circumstances not to disclose information. I think everybody is in agreement that there are certain circumstances under which secrecy is advisable and indeed, the Act requires it. And I think we're all in favor of certain exemptions under the Act.

Secondly, the issue of whether the Act is worthless or not, it seems to me is completely irrelevant. None of us believe the Act is worthless, we believe the Act is in need of significant improvement particularly with respect to its actual implementation and that's what we're talking about.

We're not trying to discredit the Act itself. What we're saying is that the Act as written in the statute book is in some sense irrelevant to a certain degree.

The third issue relevant to the discussion just carried on is the inclusion in the process of public information officers, as distinguished from presidential appointees.

I think the facts of political life are such that whether or not it's advisable for a PIO to be more involved in this process, with respect to information which is politically sensitive, which the agency does not want to get out, the line policy officials are not going to let you make the decisions.

That's the way it is, and there's nothing that can be done about it. Those decisions are going to be made at the assistant secretary level, or at the bureau chief level. That's been our experience.

In the Department of Agriculture, Assistant Secretary Lyng has been involved in many of our Freedom of Information requests. In fact, in one case, Assistant Secretary Lyng ruled in favor of nondisclosure. It was taken to the Justice Department and they overruled him, and he still has refused to disclose it, and we're in court now.

That's the way it is, and that's the way it's going to continue to be, and I think we have to realize that when we're talking about the kind of information that the agency, for reasons of its own, does not want to let out, those decisions are going to be made by policy people and political people and nothing can be done about it.

I'm not sure that that's not the way it should be. We're not concerned with who decides it, we're concerned with whether the decision is a correct one and that there be remedies for citizens who are subjected to incorrect decisions.

I would hope that the discussion later on will focus on the precise structural and institutional changes that can be made in order to ensure that the incentives system is such that the correct decisions are made.

Unfortunately I'm not going to be able to be here at one o'clock when I expect you'll resume to discuss proposals. I would like to set forth one of my own specific proposals.

I presented it to the Moorhead Sub-Committee and having lost there, I'll take my issue to a wider public, I hope.

My recommendation would be the following.

1. That the agency should be required to give an affirmative or negative response to a formal request within a specified period of time, say, 20 days. If the response is affirmative the requested information must be supplied promptly as provided in the existing agency.

2. Within a specified period of time, say 20 days, from the receipt of the letter of denial, the Freedom of Information Unit would rule on the validity of denial under the Act and inform both the requestor and the agency of this ruling.

Within a specified period of time, say 10 days, the agency would have to inform the requestor of its acquiescence or non-acquiescence in the Unit's ruling. If the agency acquiesced, the information would have to be supplied promptly.

If the agency did not acquiesce or if the requestor is dissatisfied with the Unit's ruling, the requestor would then be entitled to sue immediately in a federal District Court.

Since the vast majority of information requests are routine and fall into fairly well established categories, the Freedom of Information Unit could be a very small and progressively routinized operation, whose rulings would, over time, create a consistent and integrated body of Freedom of Information law.

Finally, if the requestor is obliged to sue in order to obtain the requested information and is successful, he or she should be entitled by statute to recover reasonable counsel fees from the agency which denied his or her request.

If the court rules that the agency's denial of the information was frivolous or willful, as I suspect was the case Mr. Dobrovir mentioned, *Wealer vs. Schultz*, and is clearly the case with an analogous case.

Ron and I are now litigating a case that is identical, virtually identical with the *Wealer vs. Schultz* case, three years later, after the fiasco that Bill Dobrovir described, we're in court on the very same issue.

I have no doubt that this is a frivolous and willful denial. And in case of such denial, the requestor should be entitled to recover punitive damages from the agency in an amount established by statute.

These provisions would not only place the financial burden of a wrongful denial on the agency where it belongs, but would also provide the agency and its officials with a realistic and palpable incentive to comply with the provisions of the Act.

Mr. PLESSER. Any further comments?

At this time, I think since it's 12:45 we'd like to break for lunch. The panel this afternoon will be Mr. William Phillips of Congressman Moorhead's Subcommittee and Mr. Cushman, who is the Executive Director of the Administrative Conference.

Both of whom have studied Freedom of Information Act extensively, both of whom are very familiar with suggestions and forms and would like to present I think some of the solutions to some of the problems that we had this morning.

I don't think the afternoon session is going to last very long. Maybe an hour or two. But I would like to encourage everyone to return.

We always worry about having a session on Friday afternoon, but I hope that you'll come back, and we can finish our business. At say, 1:30 P.M.

[Adjourned for luncheon.]

Mr. PLESSER. This afternoon as previously discussed we're going to discuss PROPOSED REGULATIONS that can be implemented in regulations to improve the operation of and practices under the Freedom of Information Act.

One of the most glaring deficiencies in the government operation of the Freedom of Information Act from my point of view, is that each agency has different and in some cases, substantially different regulations.

There seems to be a need to get uniform regulations, especially to reduce the procedural aspects of them to one standard form throughout the government. As it stands now each time I have to go to the Federal Register and read through through regulations to see what the procedural steps are. It is a terrible burden to have to look at a different set of regulations each time you want to make a request from a different agency.

One of the things that we would like to stress at this meeting is the need for some kind of uniform adoption of regulations. I think the subcommittee on Government Operations makes a lot of suggestions, and we will have the opportunity to examine them here.

Some of the really revolutionary changes that we'd like in the regulations are things that are already contained in other agency regulations. For example, one of the things that DOT has is fee waiver. Let me read you the Section. I think most people are not familiar with it.

"Documents may be furnished without charge or at a reduced charge if the director of Public Affairs or the head of the operating administration concerned, as the case may be, determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public."

"Examples of requests that may fall within this paragraph are reasonable requests, from groups engaged in non-profit activity, designed for the public safety, health and welfare, schools and students engaged in the field of transportation."

Now if I would have read that, you know without saying . . . quoting, "Department of Transportation," I think that many people in this room would have said, "Oh, that's outrageous, that's something that shouldn't be and that can't be." But this is a very simple regulation that is in effect and is being used I understand quite successfully by the DOT. I hope there is someone from DOT here who could comment on that a little later.

Other suggestions were discussed this morning, especially Mr. Schnuck's suggestions as to specific time periods for response. I think that's absolutely critical. I think it's something that an agency should have seven days, and then there should be seven days for an appeal.

And those I think are the primary points that I'd like to make. I would now like to turn the panel over to Mr. Cushman.

Mr. Cushman, I think as most of you are aware, is the Executive Director of the Administrative Conference. They have come out with a set of proposed regulations concerning the procedural problems involved with the Freedom of Information Act. And Mr. Cushman worked personally on these proposals, and I would like him to comment on them and some other observations that he has at this time.

Mr. JOHN CUSHMAN. Thank you. This morning it was suggested that perhaps the Moorhead Committee or Bill Phillips here was going to recommend that the Freedom of Information Act ought to be made applicable to Congress. And there was some suggestion that perhaps that would be in the report.

I'd like to go out on a limb and say, probably not. One of the reasons is this tremendous effort that has been going on all day here to try to get copies of the Moorhead Committee Report on the Freedom of Information Act to you. I think they are very, very aware of the problems of secrecy on the Hill, and he's got a report, some of us have it, but I guess not all of us.

In any event I think it's pretty clear that the Freedom of Information Act hasn't yet been fully made applicable to Congress, whatever their intentions may be.

I was also kind of amused to note that on the copy I have it says, "Hold for release for Friday A.M." I was listening to Walter Cronkite last night at six o'clock, and he was talking about the Report, so it's also good to know that some of these problems of leaks are not exclusively in our domain.

Mr. WILLIAM PHILLIPS. If the gentleman will yield, I may defend Mr. Cronkite. The A.M. cycle starts 6 P.M. the previous evening, so he was well within the standard groundrules of the press corps in using it on his last night's news broadcast.

Mr. CUSHMAN. I happen to be a lawyer who . . . I don't know whether I should said I had the privilege . . . but I served as a public information officer for six months at the FCC, and I must say that I want to join the ranks of those who spoke here today and say that people who hold that job do a tremendous task.

I walked down there completely green, and the first thing I discovered was that the Commission was handing out 1300 copies of every single order, decree, memorandum, you name it, that the Commission acted on. And there were three little men who used to come in and pick them all up and run off with them.

I said, "My gosh, the government must be subsidizing one of the greatest distributions of paper in the world." So I called up one of my friends who was a lawyer at one of the leading law firms in town who was getting fifty copies of everything, and I said, "Look you've got a budget that's bigger than our whole agency, why can't you duplicate your own?" And he said, "Look John, you fellas make no effort to make personal service of any of your final orders on anybody, and if we didn't pick them up and deliver them to our clients, you'd be in violation of the Freedom of Information Act."

So I decided at that point to leave well enough alone.

I also happened to have been the author of some leaks when I was not a public information officer, and I must confess that having seen it from both sides, I have a new sympathy for the problem of a poor fella who is standing there not knowing anything about it, and half a dozen press people come in and say, "Where is it, where is it?" And you don't even know what it is. [Laughter.]

As noted, I am the Executive Director of the Administrative Conference. Most people don't even know who we are. We have our own public information problem. We've just got seads of very useful material and we'd like everybody to have it. We have nothing we wouldn't turn loose. The problem is that nobody really knows where we are, or what we are, or what we do.

Hopefully through meetings like this, we'll become a little better known. Since 1968, we have adopted 35 recommendations to improve administrative procedures. And I would say that of all those 35, probably half of them in one way or another touch on Freedom of Information problems.

Let me just mention one or two to give you some idea of what I mean.

We made a recommendation to make public the "No-action" letters of the Securities & Exchange Committee. These have been held confidential in the past but are now routinely released. We made a recommendation that there be reasons given for parole decisions, and that's now being considered by the Parole Board.

We have a recommendation for the broadcast of agency proceedings just a simple recommendation that says, if for some reason an agency is doing something that the press is interested in, and happens to want to cover, the normal rule ought to be that they could come in and televise it or tape it. Tremendous debate, passed by three or four votes, very close. Many of these agencies took the position that this was not the kind of thing that was going to be helpful.

We made a recommendation on discovery. We have a recommendation on articulation of agency policy. We proposed the *Consumer Bulletin* which Mrs. Knauer's office now publishes, and so on and so forth.

However, today I'm going to talk just about Recommendation 24. I did bring copies of it for anybody who might want to take a look at the more detailed kinds of regulations which we proposed.

We recognize that there is, and still remains, a tremendous problem in terms of agencies getting their information out. Our view was that one of the best ways to tell whether agencies were in fact in sympathy with the Freedom of Information Act, and really interested in seeing that its good purposes were being fulfilled, would be to see whether or not they would issue regulations which would really set out in considerable detail how you would go about getting information from an agency.

As you know, the Freedom of Information Act requires agencies to publish in the Federal Register the established places at which, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions. Now that requirement points up the fact that immediately each agency should be identifying at a minimum its public information office.

We had an excellent study prepared for us by Professor Giannella of the University of Villanova. Based on that, the Conference, in May of 1971 adopted Recommendation 24. Part A of that Recommendation sets forth five general principles that agencies should conform to in handling requests for information.

These are:

1. A restrictive interpretation of the exemptions authorizing non-disclosure.
2. Full assistance and timely action on public requests for information.
3. Disclosure to the fullest extent possible of all but exempt parts of documents.
4. Specification of reasons when requests for information are denied, together with a statement as to how the denial may be appealed.
5. A statement of minimum fees for providing information, which should be waived when in the public interest.

Part B of the Recommendation takes these five general principles and spreads them out into a set of regulations. Part C treats with the problem of fees.

The substance of the Recommendation was discussed with almost every agency when it was in the process of formulation. And I'd like to emphasize here that the guidelines part, or the detailed regulations, were in fact the recommendation at the time this was discussed with the agencies, so that what they looked at were in fact, these rather detailed provisions.

They were specifically looked at by the Department of Justice, and the Department of Justice thought they were very good. They were found acceptable by almost all agencies. However, when the Assembly of the Conference came to consider the recommendation, it decided that it should not get into the business of really adopting proposed regulations for agencies to take on. So instead of putting out the detailed proposal which we had circulated to the agencies, the Conference adopted only the general principles. However, the guidelines are regarded by us at the Administrative Conference as the model, and they are used in our program of testing whether agencies are actually complying with our recommendation.

Recommendation 24, as in the case of all of our recommendations, was sent to all of the member agencies, that's 35 government agencies, and I think about 20 others. And during the course of the past six to nine months, we have been receiving communications back as to what's been done towards implementing it.

Now if you look only at the general principles, that is to say, this statement of general propositions, the record of agency compliance is good. Now that assumes that they have merely agreed to the principles rather than having reduced them to some kind of a specific statement in their rules. In other words, just looking at the principles and the correspondence we had with the agencies, we felt that about 25 agencies were in substantial compliance with our recommendation—that perhaps another 11 were in partial agreement because they were small agencies and there wasn't need for all this detail—and that a handful had really not taken any action or are still considering it. Some of the bigger

agencies have a problem of circulating these kinds of recommendations to the whole host of subdivisions and so forth.

However, if you took a look at the recommendation and tested it in terms of whether the agencies had in fact adopted specific proposals, the record becomes much more blurred. The General Services Administration has excellent regulations. As a matter of fact they were used as the pattern from which we drew our proposals.

A number of other agencies have excellent rules, even though they depart from our proposal. The CAB, however, just took our proposal and adopted it lock, stock and barrel.

But what we have done, and we did this in part in cooperation with Bill and the Committee, was to go to the agencies and ask them these questions: (1) Is an Information Office or an official adequately identified? (2) Most requests be made on a special form? (3) Are there rules requiring prompt handling of requests, statements of reasons for denials and procedures for appeals? (4) What provision, if any, is made for charging for information? (5) Are the fees reasonable?

In general, the agency rules are good in identifying an office where the public may go or write for information. In this connection, I would point out that the descriptive information about the agencies contained in the U.S. Government Organization Manual now contains, as I think most of you know, a small box which says in effect, "if you want more information, call this number." This, incidentally, was a recommendation of the Administrative Conference, a very early recommendation, which has been fully implemented and our experience in talking with agencies has been that it's worked very well.

A very few agencies require an application to be submitted on a special form.

But actually, as we talked to the people, we were told that most of the agencies are willing to waive the form providing the request is specific enough for identifying the documents that are being requested.

Now from here on the record is not so good. Very few agencies have specific rules requiring the agency to respond to requests for information within any given time. Our proposal was that there be ten days in which you either would respond by producing the requested information, or alternatively, respond by saying for one reason or another, that the documents are not available here, or whatever it may be, we need a slightly longer time. But at least you wouldn't leave the citizen in limbo indefinitely, for months on end, not knowing one way or another.

Most of the agency rules in this field are silent as to a specific time to respond and merely state that they will handle requests promptly. As indicated this morning, there is some question as to what the definition of "promptly," may be.

Very few agencies have rules to provide for giving reasons for the denial of a request. The practice, as distinct from having a rule, is often to cite the exemption in the Freedom of Information Act. But again, many of the agencies are reluctant to give any information as to why they think a particular exemption is applicable for fear perhaps that they may prejudice themselves if they wind up in some kind of litigation.

Most agency rules will state the office or officer to which an internal agency appeal may be taken. However, again from our review of this matter, there is really no time limit set in agency rules as to how long the agency may take for considering an appeal. In our recommendation we have a specific proposal as to a reasonable period of time, and indeed, we even go so far as to propose that if after exhausting all reasonable recourse and there is still a refusal of the agency even to give a fellow a response, he can treat the request as denied and seek judicial review.

The final part of the recommendation deals with the question of fees. In our recommendation we proposed that a committee from OMB, Justice and GSA, meet to consider this because this is peculiarly an area where OMB has a strong interest and where uniformity would be exceedingly desirable. There is no reason why copying charges should be five cents a page in one agency and fifty cents a page in another for doing essentially the same thing.

The Office of Legal Counsel took the initiative in calling a meeting on this subject and as I understand it, from a conversation yesterday, OMB now has the ball and they are very hopeful to have some kind of a report out within a matter of several weeks. When the Interagency Committee was active, it met and reached several conclusions. First, fee schedules for routine reproduction or photocopying of documents are often too high. Second, the charges for time spent in routine search or in monitoring reproduction should be at a clerical rate. And then they recognized that there should be a good deal of flexibility with respect to certain,

what they call, non-routine compilations, so that there was an area in which agencies necessarily would have to have a good deal of discretion and consequently the charge which would be made, couldn't necessarily be ascertained in advance. In some instances, even what might be considered a modest charge could mount up and pyramid so that in effect, a fellow couldn't afford to get the information even if the agency was willing to produce it.

We went to the agencies to see exactly what they were doing in this area as well. And we found that almost every agency has a rule which calls for charging fees. They also invariably have a rule which as we saw it, permits them to make no charge when what's involved is de minimis that is to say, one or two copies of something that's off the shelf or where the charge would be a dollar or two and the administration of it would be more expensive than ignoring the charge.

Several agencies have a mandatory minimum charge, merely for handling the information request, whether or not you get any information. We've taken the view that that's undesirable.

As I indicated earlier, the charges vary widely. Agriculture comes in looking good here—I think they indicate a charge of 5¢ per page for a routine duplication. Some agencies have charged as much as a dollar a page. A charge of 25¢ per page appears to be the most common and in our view we regard that as high. The clerical research charges vary from anywhere from \$3 to \$7, and we think this ought to be standardized.

The American Bar Association's Section on Administrative Law filed some comments in the Moorhead proceedings in which it said "Agencies should conform insofar as is practicable their internal regulations with the uniform regulations in implementation of the Freedom of Information Act recommended by the Administrative Conference of the United States." The Administrative Law Section believes that adoption of these regulations which established specific time limitations for responding to requests, require that denials be supported with specific references to exemptions, and provide for uniform fees for furnishing records and the like, would do as much as any single measure to ensure effective implementation of the Freedom of Information Act.

We of course, modestly agree with that, and fortunately the Conference is a continuing agency, its sole function is to work cooperatively with the agencies to achieve compliance with its recommendations, and I can assure you that we are going to continue working in this field.

Thank you very much. [Applause.]

Mr. PLESSER. Thank you. Bill, would you like to say a couple of words?

Mr. WILLIAM PHILLIPS. Our subcommittee has worked very closely with the Administrative Conference. We think that the basis for their Recommendation Number 24 is sound. When you read our report, you will see that we have incorporated a number of those recommendations into our report.

Some are administrative in nature, some are in between, and in several we have recommended amendments to the Act itself. Now these matters are all a matter of degree. I don't feel there's any reason why agencies could not take the basic recommendations contained in Number 24 and incorporate them into their own Freedom of Information Act regulations, without the necessity of Congress amending the Freedom of Information Act to require it.

However, our experience has shown that a number of agencies probably wouldn't do this, so that it may be necessary in the next Congress for the committee to consider specific legislation to amend the Act to make sure that these important recommendations of the Administrative Conference are actually carried out.

Mr. PLESSER. Is there anything...

Mr. PHILLIPS. Why don't I just continue? My presentation is going to be very brief.

First I want to apologize for not having copies of our report here. Certainly it's to our advantage to circulate it, and hopefully, your advantage to read it. We had been assured that up to yesterday afternoon by GPO that there would be sufficient quantities back from the printer to distribute this morning.

Indeed, we did get sufficient quantity, but lo and behold, GPO made a mistake and one page is blank in the report, so it had to go back for correction. That's the reason why you don't now have it. The number of the report, if you'd like to make a note of it, is House Report 92-1419. We probably will have copies in our subcommittee on Monday or Tuesday of next week. If you'd like to make sure that you get one, you can call us at Code 180—Extension 3741 or direct dial—225-3741. If you want bulk quantity, you can get them from the House

Document Room. We'll be glad to send a copy or two, but our supply is limited too. The House Document Room will have it in greater quantity, if for example, you want every person on your legal staff or public information office to have a copy.

I should also point out that the hearings on which this report is based, are available from our subcommittee office. They are Parts 4, 5, and 6 of our Freedom of Information Act hearings.

This covers 14 days that we devoted to hearings on the administration of the Act itself. Other aspects of our hearings covered such subjects as "Executive Privilege," security classification, information practices of advisory committees, and other subjects related to Freedom of Information.

But Parts 4, 5, and 6 are devoted directly to this report and these volumes contain the testimony of executive departments and agencies, I think 36 in all, who testified at some point during our hearings.

I'd now like to speak just briefly as to some of the more important recommendations that were made in our report. When you get your own copy, you will see ADMINISTRATIVE RECOMMENDATIONS on pages 81 and 82.

They are divided into two parts. The three basic recommendations are directed at the Department of Justice. We heard this morning about the Office of Legal Counsel and the Freedom of Information Committee, which has the somewhat awesome responsibility in the administration of the Act through their advisory functions with other departments and agencies.

These three recommendations to the Department of Justice—we hope and trust—will be implemented. We think that they are reasonable and positive. They result from our experience and actual proposals and discussions that took place during the hearings.

The first of them states—"We recommend that the Department of Justice initiate a review of all department and agencies regulations to determine the degree of compatibility both with the Attorney General's memorandum and court decisions under the Act."

Where deficiencies or inadequacies are found as a result of this review, we would hope that the Justice Department would use its good offices to strongly encourage the departments and agencies to make amendments to their own regulations to bring them into the conformity of the Act—both the letter and the spirit—so that it will work better.

We realize that this is not an easy job. It's going to take a considerable amount of time and manpower in OLC. We would hope that the Department's budget request would reflect necessary increases in manpower to make this possible.

The second recommendation affecting the Department of Justice is—"That the Office of Legal Counsel issue advisory opinions on the Freedom of Information Act to other department and agencies, general counsels, and public information personnel."

We feel that this is particularly important when the court hands down an important decision—not a narrow one—but a decision that is going to affect the day-to-day administration of the Act.

We found that in some cases that even when a court decision affected a particular department, responsible people in that department did not always know exactly what the court had ruled. Their subsequent actions were often based on situations that existed prior to the court decision.

We think that the OLC—with its expert knowledge of the Act—could issue these advisory opinions, perhaps in a loose-leaf form. This would be extremely helpful in keeping responsible people, who deal with the Act on a regular basis, advised as to what is going on that affects it, and how it is being interpreted by the courts.

The third recommendation is so obvious that we wonder why it hasn't been done before. It would have the Department of Justice draft and have printed a very simple layman's pamphlet on the Freedom of Information Act—what its provisions are; how a person uses it to get information from a government agency; what his rights are if that request is refused; how the appellate procedure works, and what his legal rights are.

This would not be written for lawyers, or professors, but for the average citizen who might want to make use of the Freedom of Information Act. We think this is particularly important for use in regional and area offices, where our experience has shown that there's quite a bit of misunderstanding or complete lack of knowledge of the Freedom of Information Act at all. There's also much delay and much difficulty in local areas where so many of our federal programs are actually administered. We think that this pamphlet makes a lot of sense. It's not an earth-shaking thing, but we think it would help in an overall way.

Other administrative recommendations are directed to all government agencies in varying degrees. As Chairman Moorhead indicated this morning, he plans to transmit a letter to the head of every department and agency who is subject to the Act, calling attention to these seven additional recommendations that are administrative in nature and request a response to indicate what is going to be done to implement them.

They are fairly broad ranging. I won't go into great detail. They appear on Page 82 of the report.

One of them has to do with better record-keeping of requests for information made under the Act.

We also ask that each agency head make a positive statement affirming his personal commitment to the principle embodied in the Freedom of Information Act. There was a lot of talk this morning about attitude; any of us who had any dealings with this unique law knows that it relies a great deal on the attitude of those who administer it. We think that if the head of a department or an agency issues a formal statement to all employees—posted on a bulletin board or some other administrative channel—supporting the principles of the Freedom of Information Act, we think that will have a salutary affect on the day-to-day administration by those in the particular department or agency.

The third recommendation is that letters refusing access to information requested cite the specific exemption under the Act. This is one of the basic features of Recommendation 24 . . . so that the individual can know just why he is being denied that information. Also recommended is that he be advised of his appeal rights under the regulations of that particular agency.

The reproduction fee and search fee should be uniform. This is another one of the recommendations that John Cushman mentioned earlier. We repeat it here. I am told that a number of agencies have moved in this direction, but many have not. As John indicated, in our discussions with OMB, the ball is now in their court on this matter.

We were advised in May by OMB that there was going to be some general policy established—perhaps an amendment to Circular A-25 or perhaps an entirely new Circular that would govern fees under the Act itself. And for the same reason that John has already stated, our hearings also confirmed that many agency search fees and copying fees are abnormally high. In a number of cases that were presented to our subcommittee, this was a direct deterrent to the individual in obtaining information.

We had one case where a \$91,000 copying fee was cited for information that was requested. We have other examples where individuals are asked to put up \$100 or \$200 deposit for a copying job. These are not people off the streets, but university professors, law firms, or individual companies that obviously could afford to pay for the fee.

We had a case a week or so ago, that I think illustrates this problem very well. A citizen asked for a copy of the Index of a publication of an agency and was sent a bill for \$259 for search. He's still trying to figure out what would take 59 hours—this was what the bill indicated—59 hours of search time to find the Index of a publication that was published by that department. And this is the kind of thing that Recommendation 24 is aimed at and also our own recommendation.

There are several others that I won't go into at this time. Very briefly on the legislative side, as Chairman Moorhead indicated, he plans to introduce a bill prior to adjournment of this session, embodying the ten or twelve specific legislative recommendations contained on Pages 82 to 84 of the report.

Some of these deal with Section 552(a)(3) of the Act. I will just run through very briefly a couple of them, so you'll get the flavor.

One deals with the definition of identifiable records which is in subsection (a)(3) of the Act. There have been some difficulties that came up in our hearings about the degree of identification that is required by some agencies who may be reluctant to make information available to a requester. So we are proposing a better definition to broaden the meaning of "an identifiable record."

The second recommendation in (a)(3) would be to require a ten-working-day response by an agency to a request and a 20-working-day response on appeals. This follows identically the Administrative Conference recommendation. We feel that it probably should be written into the law because it would have a lot more effect than if it were done by regulation. Besides that, we're not certain—just how many agencies would, in fact, implement that recommendation by amending their own regulations. So we propose to amend the Act itself.

I know this is an arbitrary time-frame. We're not suggesting that, in every case, it can be adhered to precisely, but as John Cushman indicated, at least in a ten-working-day period a requester could be notified that the particular information either is going to be made available, or that it is going to be denied.

Our subcommittee regularly deals with documents from abroad in our foreign operations activities. We know that it is not always possible to get back a document, directive, or other information from AID or MACV in Saigon within ten days in every instance. If an individual seeking information that had to be obtained from abroad were told that "Well, it might take 15 days or 16 days," I then don't think that this would make him mad enough to go out and file suit under the Act.

This is a rational approach to a sometimes difficult administrative problem.

The third legislative objective goes into a very touchy area of Federal Rules of Civil Procedure, whereby the government is now given 60 days to file responsive pleadings in civil cases while private litigants are given only 20 days.

We propose to amend the Act to make that 20 days applicable to the government as well as the litigant in Freedom of Information cases. We've seen too many cases where a U. S. attorney goes into a Federal court and automatically asks for the 60 days, whether he needs it or not.

And in many cases, that 60 days can make the difference between whether the individual can use the information if he finally does get it, or just gives up in disgust. I know there's going to be some difference of opinion on this from our good friends downtown in Justice, and I'm not saying that this is a black-and-white situation. There are times when more than 60 days is perhaps needed to file a response of pleading in a very complicated case. But our studies have shown that during the last five years of litigation under the Act, the average time of the government in filing response to pleadings in FOI cases has been 67 days. We found a couple of cases where the time period has been 240 or 250 days. This means that the government goes in time and again, and asks for 60 additional days to respond. We feel that this is an abuse of the process, and if the only way to tighten it up is by amending the law, this is going to be the route we try to go.

The fourth amendment in subsection (a)(3) deals with court costs and reasonable attorney fees. This was recommended by a great number of witnesses and also by the Administrative Law Section of the American Bar Association.

We feel that this practice is fairly well established in our system of jurisprudence. These awards are made at the discretion of the court. Similar language is included in our Civil Rights Acts and in the Equal Employment Opportunity Act also.

The last amendment to (a)(3) is that federal agencies be required to file an annual report with Congress on their stewardship of the Freedom of Information Act. This would include record-keeping and relates to our administrative recommendation earlier, about keeping records of requests, denials and so forth.

The other proposed amendments deal with very touchy areas of exemptions contained in the Act. I know that there are some who argue that the courts have not ruled sufficiently on many of the exemptions to warrant any amendment by the Congress, at this point, after five years.

However, the majority of our subcommittee—in fact, the overwhelming majority of the full committee as well—felt that there were several exemptions where there is sufficient court rulings, interpretation, and testing, trial and error, to be able to make some rational decisions.

We have recommended an amendment to three or four of the nine exemptions in section 552(b). I think probably the most touchy ones are in (b)(4)—the trade secrets exemption—and in (b)(7)—exemptions for law enforcement purposes.

The legislative objectives on pages 82-84 of our report are quite specific, although they stop short of recommending specific language. The bill language that will come out of these recommendations will be more clear than the statement of the purpose as contained in the report.

One part of (b)(4), the trade secrets exemption. I think merits a little bit of attention and some discussion. It is an interesting principle that we propose to incorporate in the trade secrets exemption, stated in the report as follows—"a general principle should be considered providing that this exemption shall not apply to information furnished by any person when the purpose of providing the information is to secure a specific financial benefit or privilege from the federal government."

What this really says is that certainly there are some trade secrets that should be protected and the original Act provided for that, and we do not propose to disturb that at all. But what we're saying is, if someone requests, for example, a price increase on a product, he should not be permitted to hide—nor should the Price Commission withhold from the public—the basis for that price increase. If, by providing that information publically, he feels that he would reveal a trade secret of his company, then he has two choices—he either doesn't apply for the price increase on that product, or he does, and makes it available to public scrutiny.

This is an example of the kind of thing that we're hoping can be written into the law. There are many, many other kinds of examples where grant applications and loan applications and so forth contain certain data which is often given blanket trade secret exemption, despite the fact that the company or that individual is the only one who really is going to benefit from that privilege or loan or grant or whatever it is made possible by the government.

We think that there are two kinds of things involved here, and we're trying to draw the line between the two. It's going to be a little harder to draft this into legislative language than I've made it appear, I'm sure of that.

Finally, three other recommendations were made to other committees of Congress because of their own jurisdiction. In one, "we recommended that Section 3107 of Title V, the 1913 Statute that prohibits the use of appropriated funds to pay a publicity expert, be deleted from annual appropriation bills."

We had considerable testimony on this subject. Members of our subcommittee feel very strongly about this, feeling that this ancient proviso has been a deterrent to the legitimate government public information activities at a time when there should be an abundance of public information made available to people throughout the country to inform them of what federal programs are available and how they may benefit from them.

And the use of this rider in appropriation bills since 1913, we think, is just totally ridiculous. We wish our committee had the jurisdictional authority to repeal it outright, but we do not. This is an Appropriation Committee prerogative. We will make a strong recommendation to the Appropriation Committee and hope that they will heed it.

The other two recommendations to other committees—one is directed at the Judiciary Committee with regard to Section 1905 of Title 18. This is the statute that provides criminal penalties for government employees who make unauthorized disclosure of information.

We feel that the way this statute has been used is contrary to the Freedom of Information Act, and has been used as a club against some government employees not to make information available, that otherwise should be available, under the provisions of the Act.

The district court here in the District of Columbia recently handed down a decision in the *Shapiro vs. SEC* case, and while the statement of the court was only dicta, it did say that the provisions of Section 1905, Title 18, are not the basis for withholding information that otherwise should be available under the Freedom of Information Act.

We are asking the Judiciary Committee to take a close look at that court decision and the apparent problem that exists between 1905 and the Freedom of Information Act, and to clarify 1905—to make certain that it shall not be used as the basis for withholding of information.

Finally, we recommend to the Ways and Means Committee that they review the provisions of Section 1106 of the Social Security Act, which is being abused by the Social Security Administration we feel, in withholding information that should be available under the Act. They go far beyond the original intent of Section 1106, which was to protect privacy of Social Security recipients and others paying into the trust fund.

We are pleased to note that there is some movement on this already in the present Congress on the Senate side. We don't know what the outcome will be at this time. But this recommendation hopefully will add some weight to that effort.

I think that's about it Ron and . . .

Mr. PLESSER. I'd like to make one comment especially about Section 1106 of the Social Security Law. We just litigated a case in which we got a decision in the District Court in *Schechter vs. Richardson*. This was the case by Mal Schechter who is a newspaper reporter who received access to extended care facility reports, which are nursing home reports, done by the Social Security Administration in connection with Medicare. These are nursing homes that receive Medicare payments.

Social Security had taken the position that, as Bill had pointed out in general, but in particular, they took the position that 1106 prohibited the disclosure of all information that Social Security had including the kind of factual reports which were in many ways very similar to the Walsh-Healey reports that Mr. Dobrovir was talking about this morning.

It is not at all related to the kind of information about applicants and recipients that the original purpose of 1106 was aimed at protecting. Judge Waddy in District Court agreed with us and granted a motion for summary judgment, notice of appeal has been filed by the government and will . . . we'll see what happens. I think I'd like to discuss one further thing about this case because I think it's interesting as to the government's attitude is, at least the way "attitude" is presented to us.

One of the arguments or one of the things that people in the Social Security Administration had said to us especially to Mal Schecter over a period of years was that the information was restricted under 1106, but in any case, 1106 had a criminal sanction and that they couldn't really make the decision on their own, whether 1106 prohibited the information, after all they might subject themselves to criminal action if they released it, and they could not do that.

We couldn't really argue the point with them because 1106 certainly does have a criminal sanction which is very similar to that of 18 U.S.C. § 1905. And we litigated the action to get a determination.

We received an order from a District Court in which he felt the issue was so clear he didn't write an opinion. He just wrote a very strong order declaring this information available and gave the government 20 days. Then when we came back and said your problem is solved, you've got a federal District Court judge on your side, no one is going to send you to jail now, and the information can be released.

We got back a kind of an amorphous response saying, if we let this case go on without appealing it, 1106 is not going to have any meaning anymore, and it was critical to keep 1106 because they had it so long.

One of the arguments I made to them was, "Your information concerning applicants and recipients is protected under the sixth exemption to the Freedom of Information Act."

And there is no question about that personal kind of information being released because that is an exemption under the Freedom of Information Act. This was not sufficient, at least from their point of view. And they are appealing the case even though it seems to me, that they are free to release this information with no fear of criminal sanction. I'm criticizing them for I think the original position was, "Well, we can't do it," and then when we got a decision they are persisting in their position.

It just is an indication to me of, at least what kind of government policy and what kind of attitudes we've come up against.

May I add one thing? I think that this policy on 1106 is one of the Social Security Administration's and I think HEW to a certain extent has been being a counter force against it.

Are there any comments about what we've said?

Mr. WHALEY, from the Information Office of NIH. I want to ask Mr. Philips about the proposed amendment to the trade secrets portion.

What is the feeling now about research protocol that would be included let's say in a grant application?

Mr. PHILLIPS. First of all, the language here in the report is merely a general principle. There is no specific legislative language yet drafted. It's hard to answer a question on the specifics until the bill is prepared.

I should have pointed out earlier that after the bill is introduced, it will be transmitted to every government agency and department for comment. It will be disseminated as widely as possible among other groups that are concerned with Freedom of Information matters, such as the Administrative Conference, public interest groups, law firms and so forth.

We do not pretend that the bill first introduced to carry out these specific legislative objectives will be the final version of the bill that will be acted upon. Hearings to be held on the new bill will reflect the constructive comments and suggestions of as many people as possible.

As Mr. Moorhead said this morning, he hopes that all of you will send us your comments after you've seen the bill. There will be some publicity on it—it will be in the *Congressional Record*. We want you all to look at it; we want some comments and some suggestions about how it can be improved. Tell us what it leaves out that should be in, or perhaps changes in language. The bill

that we will hold the hearings on next year, hopefully, will have undergone some refinement process by that time.

There will be adequate public hearings held, and I would hope that anyone that feels strongly about any part of the draft bill as it is re-introduced next year will testify or file a statement for the hearing record so that we have the benefit of the broadest possible range of opinion.

Mr. LEON SILVERSTRUM, Atomic Energy Commission. Mr. Cushman, you mentioned something about deposits in connection with fees. Was your comment intended to imply that all deposit regulations would be considered a no-no?

Mr. CUSHMAN. I believe what I said was that there were a few agencies which had a mandatory charge merely for considering an application. It's a modest amount, whether you get it or not, I believe the Department of Justice for example has this sort of a rule. It says you've got to pay \$3 just to have them think about whether they're going to give it to you.

Mr. SILVERSTRUM. But then I thought you mentioned the \$250 deposit on the part of some agencies.

Mr. PHILLIPS. That was one of the points that I had made.

Mr. SILVERSTRUM. Oh, I'm sorry.

Then did you . . .

Mr. PHILLIPS. This had been paid under protest, and as a matter of fact, I think there is a good chance that this individual will get that money back. I don't think the agency can justify charging \$250 or whatever it was for a search fee for an Index of something that's in print.

Mr. SILVERSTRUM. Did your comment go to the magnitude of that amount, or the mere notion of a deposit for such?

Mr. PHILLIPS. I think in principle . . . why it was billed that way, I can't understand. It was billed for 59 hours of search time at \$4.75 an hour, I guess the figure was.

But this is not an uncommon kind of thing, although the magnitude . . . the audacity in this case, is beyond anything I've seen in a long time.

Mr. SILVERSTRUM. I guess I'm still not clear. Would you have any objections to, or concerns about, a regulation which does require a deposit before a document . . . before the agency goes ahead and processes a search?

Mr. PHILLIPS. A deposit for an anticipated service? Well, as a matter of principle I would, yes. I think that if reasonable search and copying charges are billed to an individual they will pay; if they give you a rubber check or if they don't pay, there are ways to collect it, but we had a case where a biology professor from a university was asked to put up a \$100 deposit. A hundred dollars for him was a great deal of money; he wasn't a full professor. He was teaching at a state university and doing research in his field. We thought that a requirement for such a large deposit was a rather strange way to do business.

Mr. PLESSER. Can I ask you what is the AEC policy on deposits and whether the AEC has that system and whether you think it is a defensible position.

Mr. SILVERSTRUM. Well, the specific answer to your question about the Commission is that the Commission Regulations at the moment do contain provisions concerning deposits.

Now where I do become concerned somewhat, is the situation where you're talking about clearly higher sums. Where you are talking about, not a given document, but let's say, several hundred thousand pages of documents, or at least several thousand pages of documents for which elaborate searches will be required.

Mr. PHILLIPS. I am sure that we can all think of information requests that might involve thousands and thousands of pages and tremendous expenditure of manhours to reproduce. A government official should make sure that the request is a legitimate one before proceeding. I don't necessarily think that the only way it can be done is by this deposit method. I think a letter to the effect that reproduction costs at a certain rate would work—it is a contract, it's enforceable. I'm not arguing with the deposit principle so much as individual cases that we're aware of where this has been used as a technique to avoid making information public. That's what I'm bothered by.

Mr. SILVERSTRUM. Thank you.

Mr. PLESSER. Mr. Gilliat.

Mr. BOB GILLIAT. Department of Defense, General Counsel's Office. With regard to the proposal on exemption (b) (4), I assume Mr. Phillips that when you talk about specific financial benefit, you don't include within that, anticipation of a profit by contract?

Mr. PHILLIPS. No sir. I should have pointed that out. This would not affect government contracting procedure.

Mr. GILLIAT. Okay, I mean there are other problems, but . . .

Mr. PHILLIPS. We're not against anyone making a reasonable profit.

Mr. GILLIAT. Okay. With regard to (b) (7) and the proposed change there, why on earth would you want us to reveal information in investigatory records or information contained therein simply because the investigation was completed?

I'm thinking of security investigations for example, where there were allegations made about an individual which proved to be untrue, or not significantly sufficient that we would decide to deny him the clearance.

And yet, we then gave him the clearance, the adjudication is complete. Why would you want this made available.

Mr. PHILLIPS. We don't.

Mr. GILLIAT. Well, that's what it says.

Mr. PHILLIPS. No, those types of things would be subject to exemption under either (b) (6) or (b) (1), and we would certainly not want to include personnel security investigations or investigations of violation of some other security regulation in this proposed amendment.

Of course, all these exemptions, in one sense, reinforce each other, in particular cases. What we're saying is if this information is not subject to withholding under some other exemption, that it should be made available once the investigation were completed.

There are cases like this that we've had called to our attention during the hearings. For example, investigations that involve the Occupational Safety & Health Act, is one type that's mentioned here as one of the specifics, #2 in the report under that subsection.

Mr. GILLIAT. Well, I would suggest that you make this clearer in connection with the bill because I think there's real danger. Security material is not part of a personnel file, as I understand the system for example. Maybe it's a similar file, whatever that means, but I don't know it's really an investigative file for law enforcement purposes.

Mr. PHILLIPS. After you read the bill when it's introduced, if you have problems with it, I hope you'll call me and we'll try to resolve the difficulty.

PAUL ANDREWS, attorney with the Federal Highway Administration, Department of Transportation. The problem I have, when Mr. Phillips used the word "audacity," he struck a responsive note.

And this has to do with availability of information to the press. The press has traditionally gone to the Public Affairs office to get its information, and the indication is this morning that they will use more and more the Freedom of Information Act to obtain information.

My concern is that the Freedom of Information Act would be used as a key to a Pandora's box. And to illustrate this, we had several years ago a reporter who had been rather successful in running down information. He came into our office and said, "I understand there's something wrong going on out on project and state X and state Y. Will you please furnish us with additional information on this?"

And then apparently emboldened by the fact that he'd said this much, he continued, "And in addition, we would like you to outline for us all of the things that your agency has done wrong in the last six years."

Mr. PLESSER. Sounds like a Nader request.

Mr. ANDREWS. It wasn't, it was from one of the press organizations. Of course, objectively speaking, this wouldn't have required any work on our part, but the principle is what counts. [Laughter.]

Mr. PHILLIPS. Why didn't you give him your annual report?

Mr. ANDREWS. Obviously this is not what he wanted. He was digging and wanted information. But the principle of the thing . . . I think I made my point. We asked him for more specifics on information. We didn't deny it to him, we didn't say we wouldn't give it.

Finally, the head of the press organization came back with a letter being more specific, and I hope the specificity . . . what I'm getting to . . . is still retained in exemption requirements and particularly with regard to the press. They need information fast, we realize, but shouldn't be able to walk in and say they don't know what they're looking for, but let them look.

Mr. PHILLIPS. Well, I think this is certainly the intent, and we don't presume that any class of citizens all wear the white hat. We know that there are abuses in the scope of some requests just as there are abuses in withholding.

I would hope and believe that when this legislation is drafted, it would not tip to such an extreme in the definition of identifiable that this type of situation, that you've just described, would be commonplace.

Mr. PLESSER. If I can respond with another short story. And I'm sorry Mr. Gilliat just left, because this is something that had to do with the Department of Defense.

This was a request that we made. We wanted information on the Department of Defense Drug Abuse Bureau. They've released some general statistics and general facts, but not the backup material and nothing really very detailed. The percentages I think we're all aware of. Ten percent of the people returning from Vietnam are on heroin or something like that.

We went in and had a meeting with Mr. Gilliat and a couple of colonels to try to get the information and the person with me was a sociologist who was writing the report.

We didn't know what they had because they didn't tell us. We knew they had certain facts and certain final kinds of analysis. We really didn't know what their input was, and there was no way that we could have known that their input was, because they were being very, very closed about it.

We started asking questions. The person from our organization is a sociologist, and he knew some of the procedures and some of the problems. And we asked—well, do you have this kind of study; do you have that kind of survey; have you done a profile?

And the colonel in charge of the Drug Abuse Section looked at me and he said "I don't know if I can answer this fellow. I think you guys are fishing." And I said, "What else are we going to do? How else are we going to get that body of information which is behind those statistics which you make public unless we fish, because you won't tell us what you have, and we have to ask you questions and get responses so we can know what's there." We should be given some kind of fairly broad freedom to try to get what documents and what kind of information the agencies do have.

Mr. ANDREWS. In answer to your question at the beginning of the meeting as to how the DOT regulation is working, we had a case in Highway Administration where we charged a firm \$60 for some information, before the regulation was published.

After it was published, they came in and said, "We'd now like it for nothing." And we came up with a \$5.85 figure . . . this all happened with the Public Information officer. He came in with the appeal, and they then indicated that they were an environmental organization, environmentally inclined, and qualified and so on, and "What should we do?"

And so the obvious answer was, \$5.85, it took us too long to sit down and even talk about it. In answer to your question—we do weigh the fee and also the objective tenure of the requestor—if he is in the category of public interest. We felt if they couldn't afford to pay \$5.85, they must be operating in the public interest. [Laughter.]

Mr. PLESSER. Are there any more comments?

Mr. MONDELLO. I've got a question for Mr. Cushman. The no-action letter service furnished by SEC is regarded as a valuable service where one of their regular people could write in and tell SEC what it proposed to do and get a flat yes or no answer which in effect said, "We will prosecute you if you do it," or "we won't."

Since the change where the no-action letter is now published and without identifying details, has there been a tendency to generalize the kind of information that is described in those letters, or is the service any less well performed?

Mr. CUSHMAN. I haven't followed up on it recently Tony, but it's my understanding that that has not happened. The program is going on as it had, and there has been no attempt to make these answers so general as not to be helpful.

I think one of the problems has been that we had suggested that there be some kind of an index of what we call "precedential" list of rulings. I think there has been some problem in that area largely because of the volume of the activity, but I think it's worked well, as far as I know.

Mr. PLESSER. One thing on the SEC, they've adopted Rule 144 which I think to a large extent, eliminates the necessity for no-action letters. There is still need for no-action letters for securities that were purchased prior to April of this year. But for securities purchased after April of this year, there is no need for a no-action letter because they have set forth objective standards.

Mr. CUSHMAN. I think the statement of objective standards in that rule has resulted in an approximate reduction of 80-90% in the volume of no-action letters.

Mr. PHILLIPS. Ron, I'd just like to mention one other thing. I shouldn't have skipped over it so quickly.

We recommend that there be instituted some type of instructional seminar or training program for employees who are dealing with the Freedom of Information Act on a regular basis, within the particular agency.

This doesn't mean a six months course or anything like that—but some kind of familiarization with the basic principles of the Act with the agency regulations, how requests are handled, and so forth.

Also in this connection, we recommend that a separate pamphlet be prepared by agencies along a general format, to provide these employees with something that they can refer to after the seminar is over, during the course of their duties on a day to day basis, setting forth the basics of the Act and its principles to guide them.

This is not to be confused with the general public's "layman's" pamphlet that we're recommending the Justice Department prepare and publish through GPO. This is a separate agency document for its own employees because every agency is going to have a little different situation. Such a pamphlet would enable them to deal with their own problems in the information area separately in their own little pamphlet.

Mr. TINTEL, FTC. I would like to address two questions to Mr. Phillips with respect to the contemplated ten day deadline.

We've been faced fairly frequently with requests from members of the press for items which are in . . . being worked on within the commission, but which are not yet released and it's anticipated that they may be released within a few days or perhaps within a few weeks.

Somehow they know they're around, and they ask for them. Now I believe the Attorney General's memorandum touched upon that subject, but there is nothing in the Act now that would clearly exempt the particular situation where the item is going to be released, doesn't fall within any of the exemptions, and someone demands it before it is actually released.

Mr. PHILLIPS. Well obviously if it hasn't been prepared, it can't be released. But I don't think that's what we're talking about in the ten day rule. John, would you like to comment?

Mr. CUSHMAN. Well, I was going to say the statute says you have to ask for identifiable records, which I assume by definition, means something that is in existence.

Mr. TINTEL. Yes, well this may well be something that's in existence, but at times it does take awhile to get things printed and parties have to be served, and I think the commission is very much interested in serving parties and making sure they are served at least before, or at least at the same time, as may be issued to the public.

Mr. PHILLIPS. I think your position is roughly the same as the subcommittee's. When the subcommittee holds a meeting, and approves a draft report such as this, we have calls from people who want copies of it. But we can't provide it either because it's not a report until the full Committee acts on it. This is the same kind of situation that you're referring to.

Because some particular report is in the process of being acted upon, but is not finally acted upon and approved, how can it be made available if it doesn't exist in the form in which its to be released?

That's the oversimplification because your rules are different, and your problems are different. But it's similar at least to a problem every committee has in Congress.

Mr. TINTEL. My second question concerns a very practical problem that we have most of the time. It's rare that we have a request for say, one document, or two or three documents that are readily identifiable and easily available. Our requests are usually broadsweeping. Very frequently it will entail review of thousands of documents to make sure that there's no (b) (4) type of material in there in particular.

Does the subcommittee intend to take this into consideration for as the ten day provision is concerned where a request is extensive?

Mr. PHILLIPS. You mean for example, in order to handle a request you've got to do a research job to find out if these certain documents requested, relate in a way which would compromise other documents which would be exempt?

Mr. TINTEL. Well, that's part of the problem. Let's say the request would take the form of "I want to see the commission's investigations since 1930 in the sugar industry." Well, this may involve 20 different files.

And it may involve thousands of documents. Someone has to go thru and actually pinpoint what would appear to be (b) (4) type material.

Mr. PHILLIPS. I think the . . .

Mr. TINTEL. And this very frequently will take far more than ten days just for that search alone.

Mr. PHILLIPS. Yes, I think in a case like that, one thing that might be done is to sit down then with the individual and explain the problem to him, see if he can pinpoint the specific thing he's looking for. That would be in his interest as well as yours, if he's in a hurry to get it, to see if there can be some accommodation worked out.

If that's not possible I think that if the ten day rule were enacted, you would be acting within its intent merely by telling the individual that it's going to take approximately X number of days, to do this and X number of man-hours of search and it will cost X dollars and then see what his response is.

He may change his mind about certain parts of his request, in view of the timeframe and the cost. These are things I think have to be handled on an individual case basis, and there's no effort here to be so arbitrary as to put an undue burden on an agency to a point where it's going to unduly restrict their other normal functions. That would be self-defeating.

Mr. TINTEL. In other words, your ten day proposed revision would only address itself to the question of the commission's indication of intention to either disclose or not disclose as opposed to the actual . . .

Mr. PHILLIPS. In a case such as you describe where there is a very great difficulty in finding and pinpointing a specific request. There will undoubtedly be some cases like that.

Mr. CUSHMAN. This was contemplated. Recommendation 24 deals specifically with this. I haven't seen what your statute is going to look like, but we suggested that there be compliance or denial within ten days, and then we have some exceptions:

One, is that the records be stored in whole or part at other locations.

Two, the request requires the collection of a substantial number of records.

Three, the request is couched in categorical terms and requires an extensive search for the records.

And then there are three or four others here that are on a little different point, but when additional time is required for one of the above reasons, the agency should acknowledge the request in writing within the ten day period.

It should include a brief notation of the reason for the delay and an indication of the date on which the records would be made available or a denial would be forthcoming.

Now I would assume that if you wanted to write a statute you would probably have to have some kind of language like that to take care of this sort of problem.

Mr. PHILLIPS. I think though that the rule of reason has to apply and the criteria that are set forth in this part of Recommendation 24. I think, are sound and defensible.

Mr. TINTEL. One of the reasons I bring this point up is the fact that you apparently believe that agencies in general, have taken too much time to respond. And I think when we reply to those inquiries, we are actually answering in terms of date of request versus date of actual delivery.

And I think that that can be a very time consuming . . . I would say at least 75% of our requests involve very extensive requests of that sort.

Now presumably we could have gotten a letter out readily within ten days and say, "Sure we'll comply, we have to go through the material."

Mr. CUSHMAN. Yes, well that was the abuse we were aiming at, the problem that requests were being received by agencies and they may be being processed down in some division where a lot of stuff has to be collected and in the meantime, the fella who made the request doesn't know what happened.

The next thing you know he has written to his Congressman, and he's getting all kinds of people in the act. In our proposal, in large part, it was merely designed to let the fellow know you got it and somebody is working with it, and if you give him a reason why you can't get him an answer in ten days tell him and tell him when you're going to give it to him.

In 99 cases out of 100, that will solve your problem. And that's what we hope agencies will adopt as their normal policy, but at least tell him you've got it, and you're looking at it.

Mr. PLESSER. One additional thing and this is not a legal point, is when you design your information systems and when you get information in, and when you classify it, it would be appropriate to examine the information an agency receives in light of the public's right of access to that information. And that it would seem to me a lot easier and a lot less costly in general economic

terms if, when an agency received information, in certain cases it at least made initial determinations and so that when a request came in, and if most of that information was available you wouldn't have to go through this incredible procedure and then charge an hourly fee for it.

Mr. Saloschin and I had a long conversation the other day about computer tapes, and I think this situation is going to become more and more difficult as more and more information is on computers and when programs are set up in a certain way.

As we all know, to program it in different ways is very costly. Who should bear the cost for the way the government sets up its information files?

Should the person requesting the information bear the burden and have to pay the additional cost to get that information out of that system? Or is it the burden of the government to pay those costs because after all, it was their decision to create this system without the consideration of public access?

It's a question that I don't know the answer to, but I'm not just going to sit here and say, "Well, the people . . . the public should have to pay and should have to allow search costs every time they get information." I think the government has to realize in setting up its information services and systems, that there is an obligation to give this information to the public.

Mr. SALOSCHIN. I wonder if I could just make a brief comment on this because the same thing comes up in various contexts. This morning there was something about "the contamination of records." by mixing available and non-available records and some kind of suggestion that this was done on purpose.

And then when that suggestion is dissipated because 99% of the time if it occurs, it's not done on purpose, then a further suggestion is made which seems I guess a reasonable suggestion from the viewpoint of a requestor who has encountered these problems, these fees—well even if you don't intentionally mix them, why can't you intentionally separate them at the time the piece of paper first comes into the agency, when the letter is received, or the memorandum is written.

It sounds like a reasonable enough suggestion until you reflect in broad terms on the whole human behavior trait of recordkeeping. Ask yourself how do you organize and keep records in any other phase of organized human activity. Your household records that you or your wife keeps, you may organize them by insurance policies, letters to relatives, Christmas card lists and lord knows what other records you keep.

Or in any private activity, business or school or so forth, or any government agency, there are a tremendous number of programs. These records are basically grouped to facilitate the work that the individual or organization or governmental agency does. They are grouped according to somebody's name or they are grouped chronologically or they are grouped according to projects, or they are grouped according to some section of some statute, or some other logical method of retrieval.

In the case of Justice Department records in the Litigating Divisions, they are grouped according to lawsuits. But then again they may be grouped according to what division handles the lawsuit.

And a grouping of records . . . I suppose we really ought to have a librarian or information retrieval specialist . . . but we all know, the grouping of records is not primarily organized according to whether a particular record will be available or not, that doesn't fit the needs of the person who maintains and uses the record, and besides if he did think of that question, he might not be able to resolve it.

But if he did resolve it at the time he thought about it, a year or two later the answer might be different. He might feel differently as to whether the record should or should not be made available.

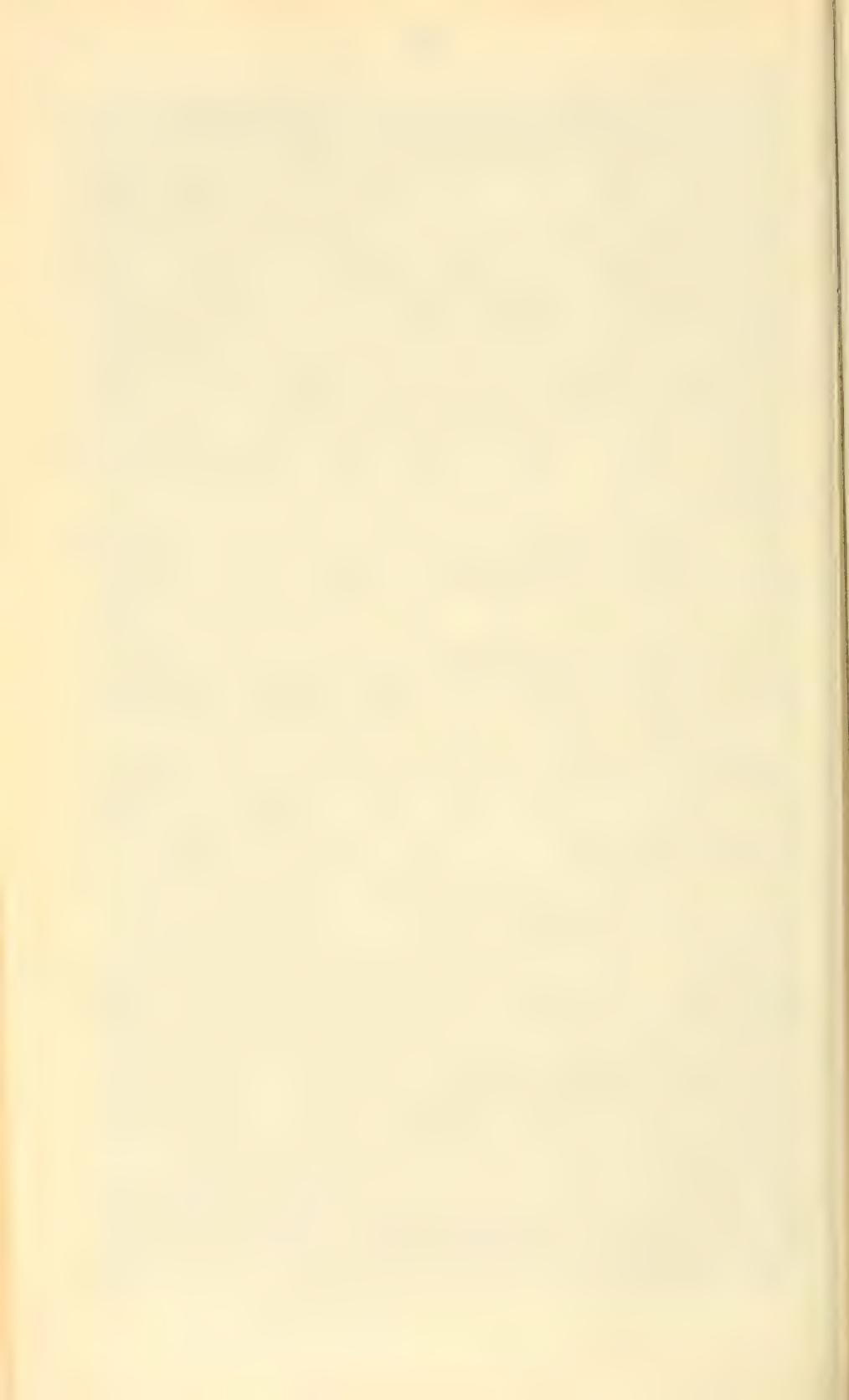
So this is why I don't think as a practical matter it's feasible in most situations to go very far in the reorganizing of your files along that basic principle.

In some areas it probably is feasible, and there it should certainly be explored, but I wouldn't be too optimistic about it.

Mr. PLESSER. Unless there are some pressing questions, I would like to call the Conference to a close.

I want to thank everyone for attending. I think it's been worthwhile, and I hope you all have. We'll be in contact again.

[Session adjourned.]



FREEDOM OF INFORMATION

PART 2—COURT DECISIONS

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ENVIRONMENTAL PROTECTION AGENCY ET AL.
v. MINK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-909. Argued November 9, 1972—Decided January 22, 1973

Respondent Members of Congress brought suit under the Freedom of Information Act of 1966 to compel disclosure of nine documents that various officials had prepared for the President concerning a scheduled underground nuclear test. All but three were classified as Top Secret and Secret under E. O. 10501, and petitioners represented that all were interagency or intra-agency documents used in the Executive Branch's decisionmaking processes. The District Court granted petitioners' motion for summary judgment on the grounds that each of the documents was exempt from compelled disclosure by 5 U. S. C. § 552 (b)(1) (hereafter Exemption 1), excluding matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," and § 552 (b)(5) (hereafter Exemption 5), excluding "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." The Court of Appeals reversed, concluding (a) that Exemption 1 permits nondisclosure of only the secret portions of classified documents but requires disclosure of the nonsecret components if separable, and (b) that Exemption 5 shielded only governmental "decisional processes" and not factual information unless "inextricably intertwined with policy-making processes." The District Court was ordered to examine the documents *in camera* to determine both aspects of separability. *Held*:

1. Exemption 1 does not permit compelled disclosure of the six classified documents or *in camera* inspection to sift out "non-secret components," and petitioners met their burden of demonstrating that the documents were entitled to protection under that exemption. Pp. 5-11.

Syllabus

2. Exemption 5 does not require that otherwise confidential documents be made available for a district court's *in camera* inspection regardless of how little, if any, purely factual material they contain. In implying that such inspection be automatic, the Court of Appeals order was overly rigid; and petitioners should be afforded the opportunity of demonstrating by means short of *in camera* inspection that the documents sought are clearly beyond the range of material that would be available to a private party in litigation with a Government agency. Pp. 11-20.

464 F. 2d 472, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a concurring opinion. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined. DOUGLAS, J., filed a dissenting opinion. REHNQUIST, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-909

Environmental Protection Agency et al., Petitioners,	}	On Writ of Certiorari to the
v.		United States Court of
Patsy T. Mink et al.		Appeals for the District of Columbia Circuit.

[January 22, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

The Freedom of Information Act of 1966, 5 U. S. C. § 552, provides that government agencies shall make available to the public a broad spectrum of information but exempts from its mandate certain specified categories of information, including matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," § 552 (b) (1), or are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," § 552 (b) (5). It is the construction and scope of these exemptions that are at issue here.

I

Respondents' lawsuit began with an article that appeared in a Washington, D. C., newspaper in late July 1971. The article indicated that the President had received conflicting recommendations on the advisability of the underground nuclear test scheduled for that coming fall and, in particular, noted that the "latest recommendations" were the product of "a departmental under-secretary committee named to investigate the controversy." Two days later, Congresswoman Patsy

Mink, a respondent, sent a telegram to the President urgently requesting the "immediate release of the recommendations and reports by inter-departmental committee" When the request was denied, an action under the Freedom of Information Act was commenced by Congresswoman Mink and 32 of her colleagues in the House.¹

Petitioners immediately moved for summary judgment on the grounds that the materials sought were specifically exempted from disclosure under subsections (b)(1) and (b)(5) of the Act.² In support of the motion, petitioners filed an affidavit of John N. Irwin, II, the Undersecretary of State. Briefly, the affidavit states that Mr. Irwin was appointed by President Nixon as Chairman of an "Undersecretaries Committee," which was a part of the National Security Council system organized by the President "so that he could use it as an instrument for obtaining advice on important questions relating to our national security." The Committee was directed by the President in 1969 "to review the annual underground nuclear test program and to encompass within this review requests for authorization of specific scheduled tests."

¹ A separate action was brought to enjoin the test itself. *Committee for Nuclear Responsibility, Inc. v. Seaborg* (D. D. C., Civ. Action No. 1346-71). After adverse decisions below, plaintiffs in that case applied for an injunction in this Court. On November 6, 1971, we denied the application, *Committee for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U. S. 917, and the test was conducted that same day.

It should be noted that in the District Court respondents stated that they "have exhausted their administrative remedies [and] . . . have complied with all applicable regulations." Petitioners did not contest those assertions.

² Petitioners also moved for dismissal of the suit insofar as respondents sought disclosure of the documents in their official capacities as Members of Congress. The District Court granted this motion, but the Court of Appeals did not reach the issue. Accordingly, the issue is not before this Court.

Results of the Committee's reviews were to be transmitted to the President "in time to allow him to give them full consideration before the scheduled events." In ¶ 5 of the affidavit, Mr. Irwin stated that pursuant to "the foregoing directions from the President," the Undersecretaries Committee had prepared and transmitted to the President a report on the proposed underground nuclear test known as "Cannikin," scheduled to take place at Amchitka Island, Alaska. The report was said to have consisted of a covering memorandum from Mr. Irwin, the report of the Undersecretaries Committee, five documents attached to that report and three additional letters separately sent to Mr. Irwin.³ Of the

³ According to the Irwin affidavit, the report contained the following documents:

A. A covering memorandum from Mr. Irwin to the President, dated July 17, 1971. This memorandum is classified Top Secret pursuant to Executive Order 10501.

B. The Report of the Undersecretaries Committee. This report was also classified Top Secret. Attached to the report were additional documents:

1. A letter, classified Secret, from the Chairman of the Atomic Energy Commission (AEC) to Mr. Irwin.

2. A report, classified Top Secret, from the Defense Program Review Committee, of which Dr. Henry Kissinger was the Chairman.

3. The environmental impact statement on the proposed Cannikin test, prepared by the AEC in 1971, pursuant to the National Environmental Policy Act, 42 U. S. C. § 4332 (C). This document had always been "publicly available" and a copy was attached to the Irwin affidavit.

4. A transcript of an oral briefing given by the AEC to the Committee. This document was classified Secret.

5. A memorandum from the Council on Environmental Quality to Mr. Irwin. This memorandum was separately unclassified.

C. In addition to the covering memorandum and the Committee's report (with attached documents), were three letters that had been transmitted to Mr. Irwin:

1. A letter from Mr. William Ruckelshaus, for the Environmental

total of 10 documents, one, an Environmental Impact Statement prepared by AEC, was publicly available and was not in dispute. Each of the other nine was claimed in the Irwin affidavit to have been

“prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose.”

In addition, at least eight (by now reduced to six) of the nine remaining documents were said to involve highly sensitive matter vital to the national defense and foreign policy and were described as having been classified Top Secret and Secret pursuant to Executive Order 10501.⁴

On the strength of this showing by petitioners, the District Court granted summary judgment in their favor on the grounds that each of the nine documents sought was exempted from compelled disclosure by §§ (b)(1) and (b)(5) of the Act. The Court of Appeals reversed, concluding that subsection (b)(1) of the Act permits the

Protection Agency. This letter was classified Top Secret, but has now been declassified.

2. A letter from Mr. Russell Train, for the Council on Environmental Quality. Although the Irwin affidavit states that this letter was classified Top Secret, petitioners concede that it was so classified “only because it was to be attached to the Undersecretary’s Report.” Brief, at 6, n. 5.

3. A letter of Dr. Edward D. David, Jr., for the Office of Science and Technology. This letter is classified Top Secret.

⁴These eight documents were also described as having been classified as “Restricted Data . . . pursuant to the Atomic Energy Act of 1954, as amended. (42 U. S. C. 2014 (Y), 2161 and 2162.)” Petitioners have not asserted that these provisions, standing alone, would justify withholding the documents in this case. But see 5 U. S. C. § 552 (b)(3), relating to matters “specifically exempted from disclosure by statute.”

withholding of only the secret portions of those documents bearing a separate classification under Executive Order 10501: "If the nonsecret components [of such documents] are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed." 464 F. 2d 742, 746. The court instructed the District Judge to examine the classified documents "looking toward their possible separation for purposes of disclosure or nondisclosure."

In addition, the Court of Appeals concluded that all nine contested documents fell within subsection (b)(5) of the Act, but construed that exemption as shielding only the "decisional processes" reflected in internal government memoranda, not "factual information" unless that information is "inextricably intertwined with policymaking processes." The court then ordered the District Judge to examine the documents *in camera* (including, presumably, any "nonsecret components" of the six classified documents) to determine if "factual data" could be separated out and disclosed "without impinging on the policymaking decisional processes intended to be protected by this exemption." We granted certiorari, 405 U. S. 974, and now reverse the judgment of the Court of Appeals.

II

The Freedom of Information Act, 5 U. S. C. § 552,⁵ is a revision of § 3, the public disclosure section, of the Administrative Procedure Act, 5 U. S. C. § 1002. Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute. See S. Rep. No. 813, 89th Cong., 1st Sess., 5 (1965) (herein-

⁵ The Act was passed in 1966, 80 Stat. 250, and codified in its present form in 1967. 81 Stat. 54.

after, S. Rep. No. 813); H. R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6 (1966) (hereinafter, H. Rep. No. 1497). The section was plagued with vague phrases, such as that exempting from disclosure "any function of the United States requiring secrecy in the public interest." Moreover, even "matters of official record" were only to be made available to "persons properly and directly concerned" with the information. And the section provided no remedy for wrongful withholding of information. The provisions of the Freedom of Information Act stand in sharp relief against those of § 3. The Act eliminates the "properly and directly concerned" test of access, stating repeatedly that official information shall be made available "to the public," "for public inspection." Subsection (b) of the Act creates nine exemptions from compelled disclosures. These exemptions are explicitly made exclusive, 5 U. S. C. § 552 (c), and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed. Aggrieved citizens are given a speedy remedy in district courts, where "the court shall determine the matter *de novo* and the burden is on the agency to sustain its action." 5 U. S. C. § 552 (a)(3). Non-compliance with court orders may be punished by contempt. *Ibid.*

Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not "an easy task to balance the oppos-

ing interests, but it is not an impossible one either Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 813, at 3.⁶ •

It is in the context of the Act's attempt to provide a "workable formula" that "balances, and protects all interests," that the conflicting claims over the documents in this case must be considered.

A

Subsection (b)(1) of the Act exempts from forced disclosure "matters . . . specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." According to the Irwin affidavit, the six documents for which Exemption 1 is now claimed were all duly classified Top Secret or Secret, pursuant to Executive Order 10501, 3 CFR 280 (Jan. 1, 1970). That order was promulgated under the

⁶ The Report states (*ibid.*):

"It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language

"At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.

"It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."

See also H. Rep. No. 1497, at 6.

authority of the President in 1953, 18 Fed. Reg. 7049, and, since that time, has served as the basis for the classification by the Executive Branch of information "which requires protection in the interests of national defense."⁷ We do not believe that Exemption 1 permits compelled disclosure of documents, such as the six here, that were classified pursuant to this Executive Order. Nor does the Exemption permit *in camera* inspection of such documents to sift out so-called "non-secret components." Obviously, this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored.

The language of Exemption 1 was chosen with care. According to the Senate Committee, "[t]he change of standard from 'in the public interest' is made both to delimit more narrowly the exception and to give it a more precise definition. The phrase 'public interest' in Section 3 (a) of the Administrative Procedure Act has been subject to conflicting interpretations, often colored by personal prejudices and predilections. It admits of no clear delineations." S. Rep. No. 812, at 8. The House Committee similarly pointed out that Exemption 1 "both limits the present vague phrase, 'in the public interest,' and gives the area of necessary secrecy a more precise definition." H. Rep. No. 1497, at 9. Manifestly, Exemption 1 was intended to dispell uncertainty with respect to public access to material affecting "national defense or foreign

⁷ Executive Order 10051 has been superseded, as of June 1, 1972, by Executive Order 11652, 37 Fed. Reg. 5209, which similarly provides for the classification of material "in the interest of national defense or foreign relations."

Portions of two documents for which Exemption 1 is claimed were ordered disclosed in connection with the action brought to enjoin the test (see n. 1, *supra*). Petitioners seek no relief with respect to any matters already disclosed.

policy." Rather than some vague standard, the test was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret. The language of the Act itself is sufficiently clear in this respect, but the legislative history disposes of any possible argument that Congress intended the Freedom of Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them. Thus the House Report stated with respect to subsection (b)(1) that "citizens both in and out of Government can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense or to advance foreign policy, such as matters classified pursuant to Executive Order 10501." H. Rep. No. 1497, pp. 9-10.^s Similarly, Representative Moss, Chairman of the House Subcommittee that considered the bill, stated that the exemption "was intended to specifically recognize that Executive order [No. 10501]" and was drafted "in conformity with that Executive order." Hearings before a Subcommittee of the House Committee on Government Operations, "Federal Public Records Law," 89th Cong., 1st Sess. (March and April 1965), pp. 52, 105 (hereinafter, 1965 House Hearings). And a member of the committee, Representative Gallagher, stated that the legislation and the Committee

^s It is true, the House Report indicates that *the President* must determine that the exempted matter be kept secret. Clearly, however, Executive Order 10501 is based on presidential authority and specifically delegates that authority to "the departments, agencies, and other units of the executive branch *as hereinafter specified*." 3 CFR, at 281 (1970). One may disagree with the scope of the delegation or with how the delegated authority is exercised in particular cases, but the authority itself nevertheless remains the President's and it is his judgment that the first exemption was designed to respect.

Report make it "crystal clear that the bill in no way affects categories of information which the President . . . has determined must be classified to protect the national defense or to advance foreign policy. These areas of information most generally are classified under Executive Order No. 10501." 112 Cong. Rec. 13659.

These same sources make untenable the argument that classification of material under Executive Order 10501 is somehow insufficient for Exemption 1 purposes, or that the exemption contemplates the issuance of orders, under some other authority, for each document the Executive may want protected from disclosure under the Act. Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering. Cf. *United States v. Reynolds*, 345 U. S. 1 (1953). But Exemption 1 does neither. It states with the utmost directness that the Act exempts matters "specifically required by Executive order to be kept secret." Congress was well aware of the Order and obviously accepted determinations pursuant to that Order as qualifying for exempt status under § (b)(1). In this context it is patently unrealistic to argue that the "Order has nothing to do with the first exemption."⁹

⁹ Respondents' Brief, at 18. Respondents note that the preamble of the new Executive Order 11652 (see n. 7, *supra*), specifies that material classified pursuant to its provisions "is expressly exempted from disclosure by Section 552 (b) (1) of Title 5, United States Code." Executive Order 10501 has no comparable recital, but only the sheerest ritualism would distinguish the effects of the two orders on any such basis. Indeed, respondents' apparent acceptance of the new order as a justifiable ground for resisting disclosure under Exemption 1 points to the absurdity of maintaining that Executive Order 10501 is irrelevant to the Act.

What has been said thus far makes wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen. It also negates the proposition that Exemption 1 authorizes or permits *in camera* inspection of a contested document bearing a single classification so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter. The Court of Appeals was thus in error. The Irwin affidavit stated that each of the six documents for which Exemption 1 is now claimed "are and have been classified" Top Secret and Secret "pursuant to Executive Order No. 10501" and as involving "highly sensitive matter that is vital to our national defense and foreign policy." The fact of those classifications and the documents' characterizations have never been disputed by respondents. Accordingly, upon such a showing and in such circumstances, petitioners had met their burden of demonstrating that the documents were entitled to protection under Exemption 1 and the duty of the District Court under § 552 (a)(3) was therefore at an end.¹⁰

B

Disclosure of the three documents conceded to be "unclassified" is resisted solely on the basis of Exemp-

¹⁰ This conclusion is not undermined by the new Executive Order 11652, which calls for the separation of documents into classified and unclassified portions, where practicable. 37 Fed. Reg., at 5212. On the contrary, that new order provides that the separating be done by the Executive, not the Judiciary, and, like its predecessor, permits declassification of material only in accordance with its procedures. More importantly, the very existence of the new order demonstrates that the Executive exercises a continuing responsibility for determining the need for secrecy in matters that affect national defense. Exemption 1 recognizes that responsibility by leaving to the Executive, under such orders as shall be developed, the decision of what may be disclosed and what must be kept secret.

tion 5 of the Act.¹¹ That Exemption was also invoked, alternatively, to support withholding the six documents for which Exemption 1 was claimed. It is beyond question that the Irwin affidavit, standing alone, is sufficient to establish that all of the documents involved in this litigation are "inter-agency or intra-agency" memoranda or "letters" that were used in the decisionmaking processes of the Executive Branch. By its terms, however, Exemption 5 creates an exemption for such documents only insofar as they "would not be available by law to a party . . . in litigation with the agency." This language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency. Drawing such a line between what may be withheld and what must be disclosed is not without difficulties. In many important respects, the rules governing discovery in such litigation have remained uncertain from the very beginnings of the Republic.¹² Moreover, at best the discovery rules

¹¹ 5 U. S. C. § 552:

"(a) Each agency shall make available to the public information as follows:

"(b) This section does not apply to matters that are—

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

The three documents are: the CEQ memorandum to Mr. Irwin, the Train letter, and the Ruckelshaus letter, which has now been declassified.

¹² See generally, 4 Moore, Federal Practice ¶ 26.61 (1972) and authorities collected (*id.*, at ¶ 26.61 [1] n. 2); 8 Wigmore, Evidence §§ 2378, 2379 (McNaughton rev. 1961) (hereinafter Wigmore).¹

There were early disputes over the issue of Executive privilege. See Chief Justice Marshall's decisions in the trial of *United States v. Burr* (No. 14,692), 25 Fed. Cas. 30 and 187, 191-192 (CCD Va.

can only be applied under Exemption 5 by way of rough analogies. For example, we do not know whether the Government is to be treated as though it were a prosecutor, a civil plaintiff, or a defendant.¹³ Nor does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant. Still, the legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that "confidential intra-agency advisory opinions . . . are privileged from inspection." *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. of Cl. 1958) (Mr. Justice Reed). As Mr. Justice Reed there stated:

"There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action."

The importance of this underlying policy was echoed again and again during legislative analysis and discussions of Exemption 5:

"It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public

1807), discussed in 8 Wigmore, § 2371, at 739–741 (3d ed. 1940) and 4 Moore ¶ 26.61 [6.-4]. See also Wigmore § 2378, at 805 and n. 21.

¹³ Different rules have been held to apply in each situation. See, e. g., *United States v. Andolschek*, 142 F. 2d 503, 506 (CA2 1944) (L. Hand, J.) (United States as prosecutor); *Bank Line, Ltd. v. United States*, 76 F. Supp. 801 (SDNY 1948) (United States as defendant). Moreover, in actions under the Freedom of Information Act, courts are not given the option to impose alternative sanctions—short of compelled disclosure—such as striking a particular defense or dismissing the Government's action.

scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation." S. Rep. No. 813, at 9.

See also H. Rep. No. 1497, at 10. But the privilege that has been held to attach to intragovernment memoranda clearly has finite limits, even in civil litigation. In each case, the question was whether production of the contested document would be "injurious to the consultative functions of government that the privilege of non-disclosure protects." *Kaiser v. Aluminum & Chemical Corp.*, *supra.*, at 946. Thus, in the absence of a claim that disclosure would jeopardize state secrets, see *United States v. Reynolds*, 345 U. S. 1 (1953), memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.¹⁴ Moreover, in applying the priv-

¹⁴ See, e. g., *Machin v. Zuckert*, 114 U. S. App. D. C. 335, 316 F. 2d 336, cert. denied, 375 U. S. 896 (1963) (Air Force Aircraft Accident Investigation Report); *Boeing Airplane Co. v. Coggeshall*, 108 U. S. App. D. C. 106, 280 F. 2d 654, 660-661 (1960) (Renegotiation Board documents); *Olson Rug Co. v. NLRB*, 291 F. 2d 655, 662 (CA7 1961) (no claim that NLRB documents are "exclusively policy recommendations"); *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F. R. D. 318, 327 (DDC 1966), *aff'd*, 384 F. 2d 979 (CADC), cert. denied, 389 U. S. 952 (1967) (discovery denied because documents "wholly of opinions, recommendations and deliberations"); *McFadden v. Avco Corp.*, 278 F. Supp. 57, 59-60 (MD Ala. 1967), and cases cited therein.

In *United States v. Cotton Valley Operators Comm.*, 9 F. R. D.

ilege, courts often were required to examine the disputed documents *in camera*, in order to determine which should be turned over or withheld.¹⁵ We must assume, therefore, that Congress legislated against the backdrop of this case law, particularly since it expressly intended "to delimit the exception [5] as narrowly as consistent with efficient Government operation." S. Rep. No. 813, at 9. See H. Rep. No. 1497, at 10. Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.¹⁶

719, 720 (WD La. 1949), *aff'd* by equally divided court, 339 U. S. 940 (1950), the United States offered to file "an abstract of factual information" contained in the contested documents (FBI reports).

¹⁵ See, e. g., *Machin v. Zuckert*, 114 U. S. App. D. C. 335, 316 F. 2d 336, 341, cert. denied, 375 U. S. 896 (1963) (private tort action; discovery of Air Force Aircraft Accident Investigation Report); *Boeing Airplane Co. v. Coggeshall*, 108 U. S. App. D. C. 106, 280 F. 2d 654, 662 (1960) (excess profits tax redetermination); *Olson Rug Co. v. NLRB*, 291 F. 2d 655, 660, 662 (CA7 1961) (discovery for use in defense to contempt proceedings); *O'Keefe v. Boeing Co.*, 38 F. R. D. 329, 336 (SDNY 1965) (private tort action; Air Force Investigation Reports); *Rosee v. Board of Trade*, 36 F. R. D. 684, 687-688 (ND Ill. 1965); *United States v. Cotton Valley Operators Comm.*, 9 F. R. D. 719 (WD La. 1949), *aff'd* by equally divided court, 339 U. S. 940 (1950) (civil antitrust suit). Cf. *United States v. Procter & Gamble Co.*, 25 F. R. D. 485, 492 (NJ 1960) (criminal antitrust prosecution). See Wigmore § 2379, at 812.

In *Kaiser Aluminum & Chemical Corp.*, *supra*, where *in camera* inspection of the documents was refused because of plaintiff's failure to make a definite showing of necessity, 157 F. Supp., at 947, the "objective facts" contained in the disputed document were "otherwise available." *Id.*, at 946.

¹⁶ See, e. g., *Soucie v. David*, 145 U. S. App. D. C. 144, 448 F. 2d 1067 (1971); *Grumman Aircraft Eng. Corp. v. Renegotiation Bd.*, 138 U. S. App. D. C. 147, 425 F. 2d 578, 582 (1970); *Bristol-Myers*

Nothing in the legislative history of Exemption 5 is contrary to such a construction. When the bill that ultimately became the Freedom of Information Act, S. 1160, was introduced in the 89th Congress, it contained an exemption that excluded:

“intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy.”¹⁷

Co. v. FTC, 138 U. S. App. D. C. 22, 424 F. 2d 935 (1970); *International Paper Co. v. FPC*, 438 F. 2d 1349, 1358-1359 (CA2), cert. denied, 404 U. S. 827 (1971); *General Services Admin. v. Benson*, 415 F. 2d 878 (CA9 1969) aff'g, 289 F. Supp. 590 (WD Wash. 1969); *Long Island R. Co. v. United States*, 318 F. Supp. 490, 499 n. 9 (EDNY 1970); *Consumers Union v. Veterans Admin.*, 301 F. Supp. 796 (SDNY 1969), appeal dismissed as moot, 436 F. 2d 1363 (CA2 1971); *Olson v. Camp*, 328 F. Supp. 728, 731 (ED Mich. 1970); *Reliable Transfer Co. v. United States*, 53 F. R. D. 24 (EDNY 1971).

The proposed Federal Rules of Evidence appear to recognize this construction of Exemption 5. Proposed Rule 509 (a) (2) (A) defines “official information” to include “intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions.” Rule 509 (c) further provides that “[i]n the case of privilege claimed for official information the court may require examination *in camera* of the information itself.”

¹⁷ Hearings before the Subcommittee of Administrative Practice and Procedure of the Senate Committee on the Judiciary, on S. 1160, S. 1376, S. 1758, and S. 1879, 89th Cong., 1st Sess., at 7 (May 1965) (hereinafter 1965 Senate Hearings). This exemption had itself been broadened during its course through the Senate in the 88th Congress. The exemption originally applied only to internal memoranda “relating to the consideration and disposition of adjudicating and rulemaking matters.” Section 3 (c) of S. 1666, 88th Cong., 2d Sess. (1964), introduced in 110 Cong. Rec. 17086. That early formulation came under attack for not sufficiently protecting material dealing with general policy matters, not directly related to adjudication or rulemaking. See Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, on S. 1666 and S. 1663, 88th Cong., 1st Sess., at 202-203, 247 (Oct. 1963).

This formulation was designed to permit "[a]ll *factual* material in Government records . . . to be made available to the public." S. Rep. No. 1219, 88th Cong., 2d Sess. 7 (1964). (Emphasis in original.) The formulation was severely criticized, however, on the ground that it would permit compelled disclosure of an otherwise private document simply because the document did not deal "solely" with legal or policy matters. Documents dealing with mixed questions of fact, law and policy would inevitably, under the proposed exemption, become available to the public.¹⁸ As a result of this criticism, Exemption 5 was changed to substantially its present form. But plainly, the change cannot be read as suggesting that *all* factual material was to be rendered exempt from compelled disclosure. Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happened to contain factual data. That decision should not be taken, however, to embrace an equally wooden exemption permitting the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of

¹⁸ See 1965 Senate Hearings, at 36, 94-95, 112-113, 205, 236-237, 244, 366-367, 382-383, 402-403, 406-407, 417, 437, 445-446, 450, 490. See 1965 House Hearings, at 27-28, 49, 208, 220, 223-224, 229-230, 245-246, 255-257. Examples of these many statements are:

Federal Aviation Administration (1965 Senate Hearings, at 446):

"Few records would be entirely devoid of factual data, thus leaving papers on law and policy relatively unprotected. Staff working papers and reports prepared for use within the agency of the executive branch would not be protected by the proposed exemptions."

Department of Commerce (1965 Senate Hearings, at 406):

"Under this provision, internal memorandums dealing with *mixed questions of fact, law and policy* could well become public information." (Emphasis in original.)

law, policy or opinion. It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, common sense approach that has long governed private parties' discovery of such documents involved in litigation with government agencies. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.

Petitioners further argue that although *in camera* inspection and disclosure of "low-level, routine, factual reports"¹⁹ may be contemplated by Exemption 5, that type of document is not involved in this case. Rather, it is argued, the documents here were submitted directly to the President by top-level government officials, involve matters of major significance, and contain, by their very nature, a blending of factual presentations and policy recommendations that are necessarily "inextricably intertwined with policymaking processes." 464 F. 2d, at 746. For these reasons, the petitioners object both to disclosure of any portions of the documents and to *in camera* inspection by the District Court.

To some extent this argument was answered by the Court of Appeals, for its remand expressly directed the District Judge to disclose only such factual material that is not "intertwined with policymaking processes" and that may safely be disclosed "without impinging on the policymaking decisional processes intended to be protected by this exemption." We have no reason to believe that, if petitioners' characterization of the documents is accurate, the District Judge would go beyond the limits of the remand and in any way compromise the confidentiality of deliberative information that is entitled to protection under Exemption 5.

¹⁹ Tr. of Oral Arg., at 23.

We believe, however, that the remand now ordered by the Court of Appeals is unnecessarily rigid. The Freedom of Information Act may be invoked by any member of "the public"—without a showing of need—to compel disclosure of confidential government documents. The unmistakable implication of the decision below is that any member of the public invoking the Act may require that otherwise confidential documents be brought forward and placed before the District Court for *in camera* inspection—no matter how little, if any, purely factual material may actually be contained therein. Exemption 5 mandates no such result. As was said in *Kaiser Aluminum & Chemical Corp., supra*, at 947: "It seems . . . obvious that the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy, is somewhat impaired by a requirement to submit the evidence even [*in camera*]." Plainly, in some situations, *in camera* inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency. The burden is, of course, on the agency resisting disclosure, 5 U. S. C. § 552 (a)(3), and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection. But the agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information. A representative document of those sought may be selected for *in camera* inspection. And, of course, the agency may itself disclose the factual portions of the contested documents and attempt to show, again by circumstances, that the excised portions constitute the bare bones of protected matter. In short,

in camera inspection of all documents is not a necessary or inevitable tool in every case. Others are available. Cf. *United States v. Reynolds, supra*. In the present case, the petitioners proceeded on the theory that all of the nine documents were exempt from disclosure in their entirety under Exemption 5 by virtue of their use in the decisionmaking process. On remand, petitioners are entitled to attempt to demonstrate the propriety of withholding any documents, or portions thereof, by means short of submitting them for *in camera* inspection.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 71-909

Environmental Protection Agency et al., Petitioners,	}	On Writ of Certiorari to the
v.		United States Court of
Patsy T. Mink et al.		Appeals for the District of Columbia Circuit.

[January 22, 1973]

MR. JUSTICE STEWART, concurring.

This case presents no constitutional claims, and no issues regarding the nature or scope of "executive privilege." It involves no effort to invoke judicial power to require any documents to be reclassified under the mandate of the new Executive Order 11652. The case before us involves only the meaning of two exemptive provisions of the so-called Freedom of Information Act, 5 U. S. C. § 552.

My Brother DOUGLAS says that the Court makes a "shambles" of the announced purpose of that Act. But it is Congress, not the Court, that in § 552 (b)(1) has ordained unquestioning deference to the Executive's use of the "secret" stamp. As the opinion of the Court demonstrates, the language of the exemption, confirmed by its legislative history, plainly withholds from disclosure "matters . . . specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy." In short, once a federal court has determined that the Executive has imposed that requirement, it may go no further under the Act.

One would suppose that a nuclear test that engendered fierce controversy within the Executive Branch of our Government would be precisely the kind of event that should be opened to the fullest possible disclosure consistent with legitimate interests of national defense.

Without such disclosure, factual information available to the concerned Executive agencies cannot be considered by the people or evaluated by the Congress. And with the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed.

But the Court's opinion demonstrates that Congress has conspicuously failed to attack the problem that my Brother DOUGLAS discusses. Instead, it has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document "secret," however cynical, myopic, or even corrupt that decision might have been.

The dissenting opinion of my Brother BRENNAN makes an admirably valiant effort to deflect the impact of this rigid exemption. His dissent focuses on the statutory requirement that "the Court shall determine the matter *de novo*" But the only "matter" to be determined *de novo* under § 552 (b) (1) is whether in fact the President has required by Executive Order that the documents in question are to be kept secret. Under the Act as written, that is the end of a court's inquiry*

As the Court points out, "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering." But in enacting § 552 (b) (1) Congress chose, instead, to decree blind acceptance of Executive fiat.

*Similarly rigid is § 552 (b) (3), which forbids disclosure of materials that are "specifically exempted from disclosure by statute." Here, too, the only "matter" to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self-protective or inadvertent the enactment might be.

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Environmental Protection Agency et al., Petitioners,	}	On Writ of Certiorari to the
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[January 22, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in part and dissenting in part.

The Court holds today that the Freedom of Information Act, 5 U. S. C. § 552 (1970), authorizes the District Court to make an *in camera* inspection of documents claimed to be exempt from public disclosure under Exemption 5 of the Act. In addition, the Court concludes that, as an exception to this rule, the Government may, in at least some instances, attempt to avoid *in camera* inspection through use of detailed affidavits or oral testimony. I concur in those aspects of the Court's opinion. In my view, however, those procedures should also govern matters for which Exemption 1 is claimed, and I therefore dissent from the Court's holding to the contrary. I find nothing whatever on the face of the statute or in its legislative history which distinguishes the two Exemptions in this respect, and the Court suggests none. Rather, I agree with my Brother DOUGLAS that the mandate of § 552 (a)(3)—“the court shall determine the matter *de novo* and the burden is on the agency to sustain its action”—is the procedure that Congress prescribed for both Exemptions.

The Court holds that Exemption 1 immunizes from judicial scrutiny any document classified pursuant to

Executive Order 10501, 3 CFR § 292 (Jan. 1, 1971).¹ In reaching this result, however, the Court adopts a construction of Exemption 1 which is flatly inconsistent with the legislative history and, indeed, the unambiguous language of the Act itself.² In plain words, Exemption 1 exempts from disclosure only material "*specifically required* by Executive order to be kept secret *in the interest of the national defense or foreign policy*." (Emphasis added.) Executive Order 10501, however, which was promulgated 13 years before the passage of the Act, does not require that any *specific* documents be classified. Rather, the Executive Order simply delegates the right to classify to agency heads, who are empowered to classify information as Confidential, Secret, or Top Secret. Thus, the classification decision is left to the sole discretion of these agency heads. Moreover, in exercising this discretion, agency heads are not required to examine each document separately to determine the need for secrecy but, instead, may adopt *blanket* classifications, without regard to the content of any particular document. Thus, as §§ 3 (b) and 3 (c) of the Order make clear, matters for which there is no need for secrecy "in the interest of the national defense or foreign policy" may be indiscriminately classified in conjunction with those matters for which there is a genuine need for secrecy:

"3 (b) *Physically Connected Documents*. The classification of a file or group of physically connected documents shall be at least as high as that

¹ Executive Order 10501 was revoked on March 8, 1972, and replaced with Executive Order 11652, 37 Fed. Reg. 5209, which became effective June 1, 1972. See pp. 7-9, *infra*.

² "The policy of the Act requires that the . . . exemptions [be construed narrowly]." *Soucie v. David*, — U. S. App. D. C. —, —, 448 F. 2d 1067, 1080 (1971). "A broad construction of the exemptions would be contrary to the express language of the Act." *Wellford v. Hardin*, 444 F. 2d 21, 25 (CA4 1971).

of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

"3 (c) *Multiple Classification*. A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications."

Even the petitioners concede,³ no doubt in response to the "specifically required" standard of § 552 (b) (1) and the "specifically stated" requirement of § 552 (c),⁴ that documents classified pursuant to § 3 (b) of Executive

³ Petitioners' Brief for Certiorari, at 9, n. 4.

⁴ Section 552 (c) provides:

"This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

The accompanying Senate Report emphasizes that § 552 (c) places a heavy burden on the Government to justify nondisclosure:

"The purpose of [§ 552 (c)] is to make it clear beyond a doubt that all materials of the Government are to be made available to the public by publication or otherwise unless *explicitly* allowed to be kept secret by one of the exemptions in [§ 552 (b)]." S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965) (emphasis added).

A commentator cogently argues that the "pull of the word 'specifically' [in § 552 (c)] is toward emphasis on [the] statutory language" of the nine stated exemptions. The "specifically stated" clause in § 552 (c), he notes, "is often relevant in determining the proper interpretation of particular exemptions." K. C. Davis, *Administrative Law* § 3A.15, at 142 (1970 Supp.). See also Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761 (1967).

For a detailed study of the Freedom of Information Act and its background, see Note, *Comments on Proposed Amendments to § 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 Notre Dame Law. 417 (1965).

Order 10501 cannot qualify under Exemption 1. Indeed, petitioners apparently accept the conclusion of the Court of Appeals that as to § 3 (b):

“This court sees no basis for withholding on security grounds a document that, although separately unclassified, is regarded secret merely because it has been incorporated into a secret file. To the extent that our position in this respect is inconsistent with the above-quoted paragraph of Section 3 of Executive Order 10501, we deem it required by the terms and purpose of the [Freedom of Information Act], enacted subsequently to the Executive Order.” 464 F. 2d., at 745.

Nevertheless, petitioners maintain that information classified pursuant to § 3 (c) of the Order is exempt from disclosure under Exemption 1. The Court of Appeals rejected that contention, and in my view, correctly. The Court of Appeals stated:

“The same reasoning applies to this provision as the one dealing with physically-connected documents. Secrecy by association is not favored. If the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed.” 464 F. 2d., at 746.

Petitioners' argument, adopted by the Court, is that this construction of the Act imputes to Congress an intent to authorize judges independently to review the Executive's decision to classify documents in the interest of the national defense or foreign policy. That argument simply misconceives the holding of the Court of Appeals. Information classified pursuant to § 3 (c), it must be emphasized, may receive the stamp of secrecy not because such secrecy is necessary to promote “the national defense or foreign policy,” but simply because it consti-

tutes a part of such other information which genuinely merits secrecy. Thus, to rectify this situation, the Court of Appeals ordered only that the District Court *in camera* determine "[i]f the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning" The determination whether any components are in fact "non-secret" is left exclusively to the agency head representing the Executive Branch. The District Court is not authorized to declassify or to release information which the Executive, in its sound discretion, determines must be classified to "be kept secret in the interest of the national defense or foreign policy."⁵ The District Court's authority stops with the inquiry whether there are components of the documents which would not have been independently classified as secret. If the District Court finds, on *in camera* inspection, that there are such components, and that they can be read separately without distortion of meaning, the District Court may order their release. The District Court's authority to make that determination is unambiguously stated in § 552 (a)(3): "the [district] court shall determine the matter *de novo* and the burden is on the agency to sustain its action." The Court's contrary holding is in flat defiance of that congressional mandate.⁶

⁵ See Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1224–1225 (1972).

⁶ "[G]iven the requirement that a file or document is generally classified at the highest level of classification of any information enclosed, it will often be the case that a classified file will contain information that could be released separately. Because it is not 'specifically required by Executive order to be kept secret,' such information is not privileged under the Information Act. To insure that an overall classification is not being used to protect unprivileged papers, a reviewing court should inspect the documents sought by a litigant." Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1223 (1972).

Indeed, only the Court of Appeals' construction is consistent with the congressional plan in enacting the Freedom of Information Act. We have the word of both Houses of Congress that the *de novo* proceeding requirement was enacted expressly "in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965) (hereinafter cited as S. Rep. No. 813); H. R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966) (hereinafter cited as H. Rep. No. 1497). What was granted, and purposely so, was a broad grant to the District Court of "authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld." H. Rep. No. 1497, at 9. And to underscore its meaning Congress rejected the traditional rule of deference to administrative determinations by "[p]lacing the burden of proof upon the agency" to justify the withholding. S. Rep. No. 813, at 8; H. Rep. No. 1497, at 9. The Court's rejection of the Court of Appeals' construction is inexplicable in the face of this overwhelming evidence of the congressional design.

The Court's reliance on isolated references to Executive Order 10501 in the congressional proceedings is erroneous and misleading. The Court points to a single passing reference to the Order in the House Report, which even a superficial reading reveals to be merely suggestive of the kinds of information that the Executive Branch might classify. Nothing whatever in the Report even remotely implies that the Order was to be recognized as immunizing from public disclosure the entire file of documents merely because one or even a single paragraph of one has been stamped secret. The Court also calls to its support some comments out of context of Congress-

men Moss and Gallagher on the House floor. But on their face, these comments do no more than confirm that Exemption 1 was written with awareness of the existence of Executive Order 10501. Certainly, whatever the significance that may be attached to debating points in construing a statute,⁷ these comments hardly support the Court's conclusion that a classification pursuant to Executive Order 10501, without more, immunizes an entire document from disclosure under Exemption 1.

Executive Order 10501 was promulgated more than a decade before the Freedom of Information Act was debated in Congress. Yet no reference to the Order can be found in either the language of the Act or the Senate Report. Under these circumstances, it would seem odd, to say the least, to attribute to Congress an intent to incorporate "without reference" Executive Order 10501 into Exemption 1. Indeed, petitioners' concession that "physically connected documents," classified under § 3 (b) of the Order, are not immune from judicial inspection serves only to reinforce the conclusion that the mere fact of classification under § 3 (c) cannot immunize the identical documents from judicial scrutiny.

The Court's rejection of the Court of Appeals' construction of Exemption 1 is particularly insupportable in light of the cogent confirmation of its soundness supplied by the Executive itself. In direct response to the Act, Order 10501 has been revoked and replaced by Order 11652 which expressly requires classification of documents in the manner the Court of Appeals required the District Court to attempt *in camera*. The Order, which was issued on March 8, 1972, and became effective on June 1, 1972, 37 Fed. Reg. 5209 (Mar. 10, 1972), explicitly attributes its form to the Executive's desire to accom-

⁷ See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951) (Jackson, J., concurring) (Frankfurter, J., dissenting).

modate its procedures to the objectives of the Freedom of Information Act:

"The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current information policies of the executive branch."

Moreover, in his statement accompanying the promulgation of the new Order, the President stated: "The Executive order I have signed today is based upon . . . a reexamination of the rationale underlying the Freedom of Information Act." 8 Presidential Documents 542 (Mar. 13, 1972).

The new Order recites that "*some* official information and material . . . bears directly on the effectiveness of our national defense and the conduct of our foreign relations" and that "[t]his official information or material, referred to as classified information or material, is expressly exempted from public disclosure by Section 552 (b)(1) of [the Freedom of Information Act]." (Emphasis added.) Thus, the Executive clearly recognized that Exemption 1 applies only to matter *specifically* classified "in the interest of the national defense or foreign policy." And in an effort to comply with the Act's mandate that genuinely secret matters be carefully separated from the nonsecret components, § 4 (a) of the new Order provides:

"*Documents in General* Each classified document shall . . . to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use."

The President emphasized this requirement in his statement:

"A major course of unnecessary classification under the old Executive order was the practical impossibility of discerning which *portions* of a classified document actually required classification. Incorporation of any material from a classified paper into another document usually resulted in the classification of the new document, and *innocuous portions of neither paper could be released.*" 8 Presidential Documents 544 (Mar. 13, 1972) (emphasis added).

It is of course true, as the Court observes, that the Order "provides that the separating be done by the Executive, not the Judiciary . . ." *Ante*, p. 11, n. 10. But that fact lends no support to a construction of Exemption 1 precluding judicial inspection to enforce the congressional purpose to effect release of nonsecret components separable from the secret remainder. Rather, the requirement of judicial inspection made explicit in § 552 (a)(3) is the keystone of the congressional plan, expressly deemed "essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, at 8; H. Rep. No. 1497, at 9. It could not be more clear, therefore, that Congress sought to make certain that the ordinary principle of judicial deference to agency discretion was discarded under this Act. The Executive was not to be allowed "to file an affidavit stating [the] conclusion [that documents are exempt] and by so doing foreclose any other determination of the fact." *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726, 727 (ND Cal. 1971). Accord, *Frankel v. SEC*, 336 F. Supp. 675, 677, n. 4 (SDNY 1971), rev'd on other grounds, 460 F. 2d 813 (CA2 1972); *Philadelphia News-*

papers, Inc. v. HUD, 343 F. Supp. 1176, 1180 (ED Pa. 1972).⁸

The Court's interpretation of Exemption 1 as a complete bar to judicial inspection of matters claimed by the Executive to fall within it wholly frustrates the objective of the Freedom of Information Act. That interpretation makes a nullity of the Act's requirement of *de novo* judicial review. The judicial role becomes "meaningless judicial sanctioning of agency discretion," S. Rep. No. 813, at 8; H. Rep. No. 1497, at 9, the very result Congress sought to prevent by incorporating the *de novo* requirement.

⁸ In support of their claim that Executive Order 10501 automatically and without judicial review activates the exemption of § 552 (b)(1), petitioners rely upon *Epstein v. Resor*, 421 F. 2d 930 (1970). Rather, *Epstein* confirms the Court of Appeals' interpretation of the Act. The *Epstein* court refused a request to review *in camera* documents classified pursuant to Executive Order 10501, but only because the Government, at the plaintiff's request, had begun a current review of the documents on "a paper-by-paper basis." Moreover, in response to the argument that petitioners advance here—namely, that the mere classification of a document precludes judicial review—*Epstein* states:

"[I]n view of the legislative purpose to make it easier for private citizens to secure Government information, it seems most unlikely that [the Act] was intended to foreclose an (a)(3) judicial review of the circumstances of the exemption. Rather it would seem that [subsection] (b) was intended to specify the basis for withholding under (a)(3) and that judicial review *de novo* with the burden of proof on the agency should be had as to whether the conditions of the exemption in truth exist." 421 F. 2d, at 932-933.

SUPREME COURT OF THE UNITED STATES

No. 71-909

Environmental Protection Agency et al., Petitioners,	}	On Writ of Certiorari to the
v.		United States Court of
Patsy T. Mink et al.		Appeals for the District of Columbia Circuit.

[January 22, 1973]

MR. JUSTICE DOUGLAS, dissenting.

The starting point of a decision usually indicates the result. My starting point is what I believe to be the philosophy of Congress expressed in the Freedom of Information Act, 5 U. S. C. § 552.

Henry Steele Commager, our noted historian, recently wrote:

"The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to. Now almost everything that the Pentagon and the CIA do is shrouded in secrecy. Not only are the American people not permitted to know what they are up to but even the Congress and, one suspects, the President [witness the 'un-authorized' bombing of the North last fall and winter] are kept in darkness." The New York Review of Books, Oct. 5, 1972, p. 7.

Two days after we granted certiorari in the case on March 6, 1972, the President revoked the old Executive Order 10501 and substituted a new one, Executive Order 11652, dated March 8, 1972, and effective June 1, 1972. The new Order states in its first paragraph that "The interests of the United States and its citizens are best

served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executives branch."

While "classified information or material" as used in the Order is exempted from public disclosure, § 4 of the Order states that each classified document shall "to the extent practicable be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use." § 4 (A). And it goes on to say "Material containing references to classified materials, which references do not reveal classified information, shall not be classified." *Ibid.*

The Freedom of Information Act does not clash with the Executive Order. Indeed the new Executive Order precisely meshes with the Act and with the construction given it by the Court of Appeals. Section 552 (a)(3) of the Act gives the District Court "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." Section 552 (a)(3) goes on to prescribe the procedure to be employed by the District Court. It says "the court shall determine the matter *de novo* and the burden is on the agency to sustain its action."

The Act and the Executive Order read together mean at the very minimum that the District Court has power to direct the agency in question to go through the suppressed document and make the portion-by-portion classification to facilitate the excerpting as required by the Executive Order. Section 552 (a)(3) means also that the District Court may in its discretion collaborate with the agency to make certain that the congressional policy of disclosure is effectuated.

The Court of Appeals, in an exceedingly responsible opinion, directed the District Court to proceed as follows:

“(1) where material is separately *unclassified* but nonetheless under the umbrella of a ‘secret’ file, the District Court should make sure that it is disclosed under the Act. This seems clear from § 552 (b)(1) which states ‘This section does not apply to matters that are (1) specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy.’ Unless the *unclassified* appendage to a ‘secret’ file falls under some other exception in § 552 (b) it seems clear that it must be disclosed. The only other exception under which refuge is now sought is (b)(5) which reads that the section does not apply to ‘inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.’”

This exemption was described in the House Report as covering “any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency.” H. R. Rep. No. 1497, 89th Cong., 2d Sess., p. 10. It is clear from the legislative history that while opinions and staff advice are exempt, factual matters are not. H. Rep., *supra*, at 10; S. Rep. No. 813, 89th Cong., 1st Sess., p. 9. And the courts have uniformly agreed on that construction of the Act. See *Soucie v. David*, 448 F. 2d 1067; *Grumman Aircraft Eng. Corp. v. Renegotiating Bd.*, 425 F. 2d 578; *Long Island R. Co. v. United States*, 318 F. Supp. 490; *Consumers Union v. Veterans Adm.*, 301 F. Supp. 796.

Facts and opinions may, as the Court of Appeals noted, be “inextricably intertwined with policy making processes” in some cases. In such an event, secrecy prevails.

Yet where facts and opinions can be separated, the Act allows the full light of publicity to be placed on the facts.

Section 552 (c) seems to seal the case against the government when it says "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." Disclosure, rather than secrecy, is the rule, save for the specific exceptions in subsection (b).

The Government seeks to escape from the Act by making the Government stamp of "Top Secret" or "Secret" a barrier to the performance of the District Court's functions under § 552 (a)(3) of the Act. The majority makes the stamp sacrosanct, thereby immunizing stamped documents from judicial scrutiny, whether or not factual information contained in the document is in fact colorably related to interests of the national defense or foreign policy. Yet anyone who has ever been in the Executive Branch knows how convenient the "Top Secret" or "Secret" stamp is, how easy it is to use, and how it covers perhaps for decades the footprints of a nervous bureaucrat or a wary executive.

I repeat what I said in *Gravel v. United States*, 408 U. S. 606, 641-642 (dissenting opinion):

"... as has been revealed by such exposes as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin 'incident,' and the Bay of Pigs invasion, the Government usually suppresses damaging news but highlights favorable news. In this filtering process the secrecy stamp is the official's tool of suppression and it has been used to withhold information which in '99½%' of the cases would present no danger to national security. To refuse to publish 'classified' reports would at times relegate a publisher to distributing only the press releases of Government or remaining silent; if it printed only the press releases or 'leaks' it would become an arm

of officialdom, not its critic. Rather, in my view, when a publisher obtains a classified document he should be free to print it without fear of retribution, unless it contains material directly bearing on future, sensitive planning of the Government."

The Government looks aghast at a federal judge even looking at the secret files and deals with disdain the prospect of responsible judicial action in the area. It suggests that judges have no business declassifying "secrets," that judges are not familiar with the stuff with which these "Top Secret" or "Secret" documents deal.

That is to misconceive and distort the judicial function under § 552 (a)(3) of the Act. The Court of Appeals never dreamed that the trial judge would reclassify documents. His first task would be to determine whether nonsecret material was a mere appendage to a "secret" or "top secret" file. His second task would be to determine whether under normal discovery procedures contained in Rule 26 of the Rules of Civil Procedure, factual material in these "secret" or "top secret" material is detached from the "secret" and would therefore be available to litigants confronting the agency in ordinary lawsuits.

Unless the District Court can do those things, the much advertised Freedom of Information Act is on its way to becoming a shambles.¹ Unless federal courts can be

¹ My Brother STEWART, with all deference, helps makes a shambles of the Act by reading § 552 (b)(1) as swallowing all the other eight exceptions. While § 552 (b)(1) exempts matters "specifically required by the Executive order to be kept secret in the interest of the national defense or foreign policy," § 4 of the Executive Order, as I have noted, contemplates that not all portions of a document classified as "secret" are necessarily "secret," for the order contemplates "excerpting" of some material. Refereeing what may properly be excerpted is part of the judicial task. This is made obvious by § 552 (b)(5) which keeps secret "inter-agency or intra-agency memorandums or letters which would not be available by

trusted, the Executive will hold complete sway and by *ipse dixit* make even the time of day "top secret." Certainly, the decision today will upset the "workable formula," at the heart of the legislative scheme, "which encompasses, balances, and protects all interests, yet places emphasis on the fullest possible disclosure." S. Rep. No. 813, *supra*, at 3. The Executive Branch now has *carte blanche* to insulate information from public scrutiny whether or not that information bears any discernible relation to the interests sought to be protected by subsection (b)(1) of the Act. We should remember the words of Madison:

"A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power knowledge gives."²

I would affirm the judgment below.

law to a party other than an agency in litigation with the agency." The bureaucrat who uses the "secret" stamp obviously does not have the final say as to what "memorandums or letters" would be available by law under the Fifth exception, for § 552 (a) (3) gives the District Court authority, where agency records are alleged to be "improperly withheld" to "determine the matter *de novo*," the "burden" being on the agency "to sustain its action." Hence § 552 (b) (5), behind which the executive agency seeks refuge here, establishes a policy which is served by the fact-opinion distinction long established in federal discovery. The question is whether a private party would routinely be entitled to disclosure through discovery of some or all of the material sought to be excerpted. When the Court answers that no such inquiry can be made under § 552 (b) (1), it makes a shambles of the disclosure mechanism which Congress tried to create. To make obvious the interplay of the nine exceptions listed in § 552 (b), as well as § 552 (c), I have attached them as an Appendix to this dissent.

² Letter to W. T. Barry, Aug. 4, 1822, IX The Writings of James Madison (Hunt ed. 1910) 103.

APPENDIX

Sec. 552 (b) and (c) of the Freedom of Information Act reads as follows:

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1039

ROBERT G. VAUGHN, APPELLANT

v.

BERNARD ROSEN, EXECUTIVE DIRECTOR,
UNITED STATES CIVIL SERVICE COMMISSION, ET AL

Appeal from the United States District Court
for the District of Columbia

Argued 7 June 1973

Decided 20 August 1973

Ronald L. Plessner, with whom *Alan B. Morrison* was on the brief, for appellant.

John C. Lenahan, Assistant United States Attorney, with whom *Harold H. Titus, Jr.*, United States Attorney, *John A. Terry*, and *Derek I. Meier*, Assistant United States Attorneys, were on the brief, for appellees.

Before: ROBINSON and WILKEY, *Circuit Judges*, and FRANK A. KAUFMAN,* *United States District Judge* for the District of Maryland.

*Sitting by designation pursuant to 28 U.S.C. § 292(c)

Opinion for the Court filed by Circuit Judge Wilkey.

WILKEY, *Circuit Judge*: Appellant sought disclosure under the Freedom of Information Act¹ of various government

¹ "5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

"(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

"(B) statements of the general course and methods by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

"(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

"(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

"(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

"(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

documents, purportedly evaluations of certain agencies personnel management programs. The District Court denied

“(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

“(i) it has been indexed and either made available or published as provided by this paragraph; or

“(ii) the party has actual and timely notice of the terms thereof.

“(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

disclosure, presumably on the ground the documents fell within one or more exemptions to the FOIA.² The scant record makes it impossible to determine if the information sought by appellant is indeed exempt from disclosure; we

“(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

“(b) This section does not apply to matters that are—

“(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

“(2) related solely to the internal personnel rules and practices of an agency;

“(3) specifically exempted from disclosure by statute;

“(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

“(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

“(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

“(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

“(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

“(9) geological and geophysical information and data, including maps, concerning wells.

“(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.”

² The trial court below granted appellee's motion for summary judgment without giving any reasons for its action. We do not, therefore, know why the District Court found the documents to be exempt from disclosure.

must remand the case to the trial court for further proceedings.

I. *Facts*

Overall responsibility to evaluate, oversee, and regulate the personnel management activities of the various federal agencies rests with the Civil Service Commission.³ The Bureau of Personnel Management, the arm of the Civil Service Commission for this task, works with the agencies in evaluating their personnel management programs. After each evaluation is complete, the Bureau issues a report entitled *Evaluation of Personnel Management*. These evaluations assess the personnel policies of a particular agency and set forth recommendations and policies customarily adopted by both agencies and Commission.⁴ Appellant, a law professor doing research into the Civil Service Commission, sought disclosure of these evaluations and certain other special reports of the Bureau of Personnel Management.⁵

The Director of the Bureau of Personnel Management Evaluation declined to release the documents sought.⁶ This refusal to disclose was sustained by the Executive Director of the Civil Service Commission, who asserted that the

³ See Exec. Order 9830 (24 Feb. 1947).

⁴ The documents under discussion are not a part of the record on appeal; the court does not, therefore, know precisely what is contained in the evaluations. Both parties, however, seem to agree that the general nature of the documents is as we have described them in the text. We may, therefore, accept this description for purposes of our discussion.

⁵ The documents other than the evaluations were described as "special studies of the Commission for fiscal years 1969-72." The exact nature of these "special studies" does not appear from the record, but it appears that they deal with the same general issues as do the evaluations.

⁶ Letter of Gilbert A. Schulkind (15 June 1972) (Joint App. at 15).

information was exempt from disclosure because it (1) related solely to the internal rules and practices of an agency;⁷ (2) constituted inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;⁸ and (3) was composed of personal and medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.⁹

After this refusal appellant filed this action in the District Court, seeking injunctive relief and an order requiring disclosure of the requested materials in accordance with 5 U.S.C. § 552(a)(3) (1970). The Government filed a motion to dismiss, or in the alternative for summary judgment, in which it was contended that the reports fell within the three exemptions given above.

⁷ The FOIA provides that

this section does not apply to matters that are

....

related solely to the internal personnel rules and practices of an agency

5 U.S.C. § 552(b)(2) (1970).

⁸ The FOIA provides that

This section does not apply to matters that are

....

inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

5 U.S.C. § 552(b)(5) (1970).

⁹ The FOIA provides that

This section does not apply to matters that are

....

personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(6) (1970).

Aside from legal arguments, the sole support, regarding the contents of the documents and their exemption, of the Government's motion was an affidavit of the Director of the Bureau of Personnel Management Evaluation. This affidavit did not illuminate or reveal the contents of the information sought, but rather set forth in conclusory terms the Director's opinion that the evaluations were not subject to disclosure under the FOIA. On the basis of this affidavit, the trial court granted the Government's motion for summary judgment. This appeal followed.

II. *Problems of Procedure and Proof under the Freedom of Information Act*

The Freedom of Information Act was conceived in an effort to permit access by the citizenry to most forms of government records. In essence, the Act provides that all documents are available to the public unless specifically exempted by the Act itself.¹⁰ This court has repeatedly stated that these exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act.¹¹ By like token and specific provision of the Act, when the Government declines to disclose a document the burden is upon the agency to prove *de novo* in trial court that the information sought fits under one of the exemptions to the

¹⁰ See footnote 1, *supra*.

¹¹ "The Legislative plan creates a liberal disclosure requirement limited only by specific exemptions, which are to be narrowly construed." *Getman v. NLRB*, 146 U.S. App. D.C. 209, 211, 450 F.2d 670, 672, *stay denied*, 404 U.S. 1204 (1971). See also *Bristol Myers v. FTC*, 138 U.S. App. D.C. 22, 25, 424 F.2d 935, 938, *cert. denied*, 400 U.S. 824 (1970); *M. A. Shapiro & Co. v. SEC*, 339 F. Supp. 467, 469 (D.D.C. 1972).

FOIA.¹² Thus the statute and the judicial interpretations recognize and place great emphasis upon the importance of disclosure.

In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. In many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought.

In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information, and this case provides a classic example of such a situation. Here the Government contends that the documents contain information of a personal nature, the disclosure of which would constitute an invasion of certain individuals' privacy. This factual characterization may or may not be accurate. It is clear, however, that appellant cannot state that, as a matter of his knowledge, this characterization is untrue. Neither can he determine if the personal items, assuming they exist, are so inextricably bound up in the bulk of the documents that they cannot be separated out. The best appellant can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain such personal information.

*EPA v. Mink*¹³ differentiates between the action by the trial court called for when the factual nature of the disputed

¹² See 5 U.S.C. § 552(a)(3) (1970).

¹³ 410 U.S. 73 (1973).

information is known and when it is not known. The first portion of the Supreme Court's decision dealt with documents the factual nature of which was not disputed; all parties agreed that the documents had been classified as "secret" by the President. The first exemption under the FOIA provides that documents which are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," are exempt from disclosure.¹⁴ Since the factual nature of the documents was undisputed and since under this undisputed description of the documents they clearly fit within the exemption, the Court held that no further inquiry or argument was permitted; they need not be revealed.

A second group of documents considered by the Court in *Mink* had not been classified "secret." They were claimed to be exempt as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."¹⁵ There was, however, a *factual* dispute regarding whether the documents actually fit this description. The Court concluded that, while material dealing with facts contained in such memoranda could be disclosed, memoranda dealing with law or policy were exempt. There was a still further *factual* dispute regarding how much of the material was factual, how much law or policy, and how much a combination of the two. With regard to this material which did not fit squarely within the language of the exemption, the Court remanded to the trial court to make a determination regarding the actual composition of the material.

The disputed information in this case is analogous to the second group of documents considered in *Mink*, in that on

¹⁴ 5 U.S.C. § 552(b)(1) (1970).

¹⁵ 5 U.S.C. § 552(b)(5) (1970).

the record facts they do not indisputably fit within one of the exemptions to the FOIA. If the factual nature of the documents were so clearly established on the record, then the court would inquire no further and would make the legal ruling as to whether they fit within the defined exemption or exemptions. In this situation, in which there is a dispute regarding the nature of the information, the Supreme Court in *Mink* provided the outline of how trial courts should approach the job of making this factual determination.¹⁶ Our discussion here is intended to be an elaboration of this outline.

This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible. In an effort to compensate, the trial court, as the trier of fact, may and often does examine the document *in camera* to determine whether the Government has properly characterized the information as exempt. Such an examination, however, may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure. In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a government characterization, particularly where the information is not extensive. But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job

¹⁶ In *EPA v. Mink*, 410 U.S. 73, 92-93 (1970), the Supreme Court provided guidance for the trial court regarding when it should conduct an *in camera* examination. The Court made it clear that it was not always necessary for a court to conduct an *in camera* examination.

of illumination and characterization as would a party interested in the case.

The problem is compounded at the appellate level. In reviewing a determination of exemption, an appellate court must consider the appropriateness of a trial court's characterization of the factual nature of the information. Frequently trial courts' holdings in FOIA cases are stated in very conclusory terms, saying simply that the information falls under one or another of the exemptions to the Act. An appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a request to review a lower court's factual determination; it must conduct its own investigation into the document. The scope of inquiry will not have been focused by the adverse parties and, if justice is to be done, the examination must be relatively comprehensive. Obviously an appellate court is even less suited to making this inquiry than is a trial court.

Here we are told that certain documents fall under three exemptions which permit the agencies to decline disclosure.¹⁷ We do not know precisely how voluminous this information is, but from the general descriptions provided it seems reasonable to conclude that the documents run to many hundreds of pages. We could test the accuracy of the trial court's characterizations by committing sufficient resources to the project, but the cost in terms of judicial manpower would be immense.

This burden is compounded by the fact that an entire document is not exempt merely because an isolated portion need not be disclosed.¹⁸ Thus the agency may not sweep a

¹⁷ See footnotes 7-9, *supra*.

¹⁸ This was made clear in *EPA v. Mink*, 410 U.S. 73, 85-94 (1970). See also *Sterling Drug v. FTC*, 146 U.S. App. D.C. 237, 243, 450 F.2d 698, 704 (1971).

document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information.¹⁹ It is quite possible that part of a document should be kept secret while part should be disclosed. When the Government makes a general allegation of exemption, the court may not know if the allegation applies to all or only a part of the information. Isolating what exemptions apply to what parts of a document makes the burden of evaluating allegations of exemption even more difficult.

Such an investment of judicial energy might be justified to determine some issues. In this area of the law, however, we do not believe it is justified or even permissible. The burden has been placed specifically by statute on the Government. Yet under existing procedures, the Government claims all it need do to fulfill its burden is to aver that the factual nature of the information is such that it falls under one of the exemptions. At this point the opposing party is comparatively helpless to controvert this characterization. If justice is to be done and the Government's characterization adequately tested, the burden now falls on the court system to make its own investigation. This is clearly not what Congress had in mind.

In two definite ways the present method of resolving FOIA disputes actually *encourages* the Government to contend that large masses of information are exempt, when in fact part of the information should be disclosed.

First, there are no inherent incentives that would affirmatively spur government agencies to disclose

¹⁹ It may be, of course, that the exempt and the non-exempt portions are so inextricably intertwined that it is impossible to separate them. The issue of whether they are intertwined is, itself, a matter of fact which must be determined by the trial court as the trier of fact. See *EPA v. Mink*, 410 U.S. 73, 92 (1970).

information. Under current procedures government agencies *lose* very little by refusing to disclose documents. At most they will be put to a court test stacked in their favor, the burden of which can be easily shifted to another by simply averring that the information falls under one of several unfortunately imprecise exemptions. Conversely, there is little to be *gained* by making the disclosure. Indeed, from a bureaucratic standpoint, a general policy of revelation could cause positive harm, since it could bring to light information detrimental to the agency and set a precedent for future demands for disclosure.

Secondly, since the burden of determining the justifiability of a government claim of exemption currently falls on the court system, there is an innate impetus that encourages agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information. Let the court decide! And the tactical ploy is, to the extent that the number of facts in dispute are increased, the efficiency of the court system involved in that dispute resolution will be decreased. If the morass of material is so great that court review becomes impossible, there is a possibility that an agency could simply point to selected, clearly exempt portions, ignore disclosable sections, and persuade the court that the entire mass is exempt. Thus, as a tactical matter, it is conceivable that an agency could gain an advantage by claiming overbroad exemptions.

The simple fact is that existing customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity. It is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual

nature of disputed information. To possible ways of achieving this goal we now turn our attention.

III. *Procedures for Testing the Classification of Claims to Exemptions.*

A. *Detailed Justification*

The problem of assuring that allegations of exempt status are adequately justified is the most obvious and the most easily remedied flaw in current procedures. It may be corrected by assuring government agencies that courts will simply no longer accept conclusory and generalized allegations of exemptions,²⁰ such as the trial court was treated to in this case, but will require a relatively detailed analysis in manageable segments. An analysis sufficiently detailed would not have to contain factual descriptions that if made public would compromise the secret nature of the information, but could ordinarily be composed without excessive reference to the actual language of the document.²¹

²⁰ This requirement is clearly mandated by the Supreme Court's language in *Mink*:

An agency should be given the opportunity, by means of *detailed affidavits or oral testimony*, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material . . . [subject to disclosure].

EPA v. Mink, 410 U.S. 73, 93 (1970) (emphasis added).

²¹ In *EPA v. Mink*, *ibid.*, the Supreme Court made the following relevant comment:

[T]he Agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information. A representative document of those sought may be selected for *in camera* inspection. And, of course, the agency may itself disclose the factual portions of the contested documents and attempt to show, again by circumstances, that the excised portions constitute the bare bones of protected matter.

B. Specificity, Separation, and Indexing

The need for adequate specificity is closely related to assuring a proper justification by the governmental agency. In a large document it is vital that the agency specify in detail which portions of the document are disclosable and which are allegedly exempt. This could be achieved by formulating a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document.²²

In employing these techniques approved by the Court the agency should be careful that it does not discuss only the representative example while ignoring the bulk of the documents which may be disclosable. Such a course of action is not permissible under the Court's language in *Mink* and would lead to the undesirable result of sweeping disclosable material under a blanket allegation of exemption.

²² In our opinion in *Sterling Drug, Inc. v. FTC*, 146 U.S. App. D.C. 237, 450 F.2d 698 (1971), we remanded a FOIA case to the trial court because it was impossible to determine from the record if the trial court had considered whether all of the disputed information was exempt or whether part was exempt and part not. There we said:

We must agree, however, that there is no indication in the opinion below that the judge considered the possibility of deleting portions of the documents. It may well be that making deletions would not change the character of these documents, since they appear to consist primarily of the thoughts and recommendation of the Commission and its staff. However, there may be appendices or statements of facts which are clearly subject to disclosure. See *Soucie v. David*, 145 U.S. App. D.C. 144 at 155, 448 F.2d 1067 at 1078 (1971). We must therefore remand the case so that the District Court judge can consider this possibility and state in his opinion that he has done so.

146 U.S. App. D.C. at 243, 450 F.2d at 704. This case is similar in that we have no way of determining the scope of the trial court's determination of exemption. From all that appears on the record, the trial judge's determination was that he found all information exempt under all three of the alleged exemptions. This inability to determine which exemptions apply to what portions of the information gives rise to the need for an adequate indexing system such as described above.

Such an indexing system would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification. Opposing counsel should consult with a view toward eliminating from consideration those portions that are not controverted and narrowing the scope of the court's inquiry. After the issues are focused, the District Judge may examine and rule on each element of the itemized list. When appealed, such an itemized ruling should be much more easily reviewed than would be the case if the government agency were permitted to make a generalized argument in favor of exemption.

The need for an itemized explanation by the Government is dramatically illustrated by this case. The Government claims that the documents, as a whole, are exempt under three distinct exemptions. From the record, we do not and cannot know whether a particular portion is, for example, allegedly exempt because it constitutes an unwarranted invasion of a person's privacy or because it is related solely to the internal rules and practices of an agency. While it is not impossible, it seems highly unlikely that a particular element of the information sought would be exempt under both exemptions. Even if isolated portions of the document are exempt under more than one exemption, it is preposterous to contend that all of the information is equally exempt under all of the alleged exemptions. It seems probable that some portions may fit under one exemption, while other segments fall under another, while still other segments are not exempt at all and should be disclosed. The itemization and indexing that we herein require should reflect this.

C. Adequate Adversary Testing

Given more adequate, or rather less conclusory, justification in the Government's legal claims, and more specificity by separating and indexing the assertedly exempt

documents themselves, a more adequate adversary testing will be produced. Respect for the enormous document-generating capacity of government agencies compels us to recognize that the raw material of an FOIA lawsuit may still be extremely burdensome to a trial court. In such cases, it is within the discretion of a trial court to designate a special master to examine documents and evaluate an agency's contention of exemption. This special master would not act as an advocate; he would, however, assist the adversary process by assuming much of the burden of examining and evaluating voluminous documents that currently falls on the trial judge.

IV. Conclusion

Upon remand the Government should undertake to justify in much less conclusory terms its assertion of exemption and to index the information in a manner consistent with Part III above. The trial judge may, if he deems it appropriate, appoint a special master to undertake an evaluation of the information.

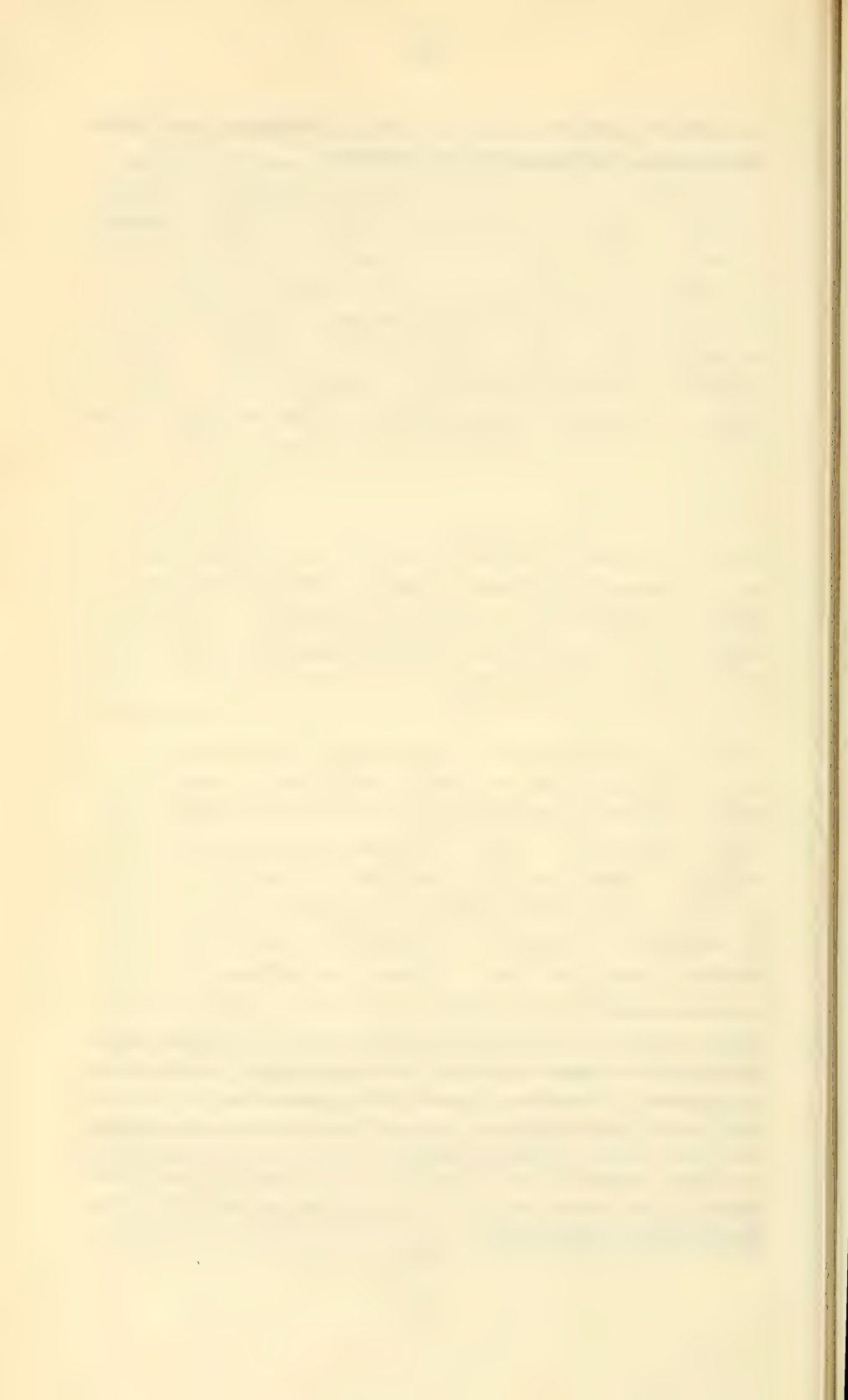
The procedural requirements we have spelled out herein may impose a substantial burden on an agency seeking to avoid disclosure. Yet the current approach places the burden on the party seeking disclosure, in clear contravention of the statutory mandate. Our decision here may sharply stimulate what must be, in the final analysis, the simplest and most effective solution — for agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt. A sincere policy of maximum disclosure would truncate many of the disputes that are considered by this court. And if the remaining burden is mostly thrust on the Government, administrative ingenuity will be devoted to lightening the load.²³

²³ In this regard, administrative agencies should consider the example set by government investigative agencies following the passage

For the reasons given, the case is remanded for further proceedings consistent with this opinion.

So Ordered.

of the Jencks Act. 18 U.S.C. § 3500 (1970). Confronted with a Congressional mandate to disclose information relevant to the testimony of witnesses in criminal trials, investigative agencies adopted procedures that assured proper disclosure. Investigative reports were prepared in a form in which the portions to which defense counsel should have access were easily removed from the file and made available to the defense counsel. Other parts of the file were kept segregated and relatively few problems were encountered.



FREEDOM OF INFORMATION

PART 3—MATERIALS RELATING TO OMB GUIDELINES ON UNIFORM SEARCH AND COPY FEES

REPORT OF THE FREEDOM OF INFORMATION FEE COMMITTEE

This report summarizes the findings and recommendations of an OMB-Justice-GSA study of problems associated with user charges for services that are provided under the Freedom of Information (FOI) Act, 5 USC 552. It is submitted to the Office of Management and Budget for its consideration and action because of OMB's responsibility under law for executive branch user charges policies.

Findings

The committee's principal findings are summarized below.

Insufficient cost recovery.—Most agencies have established user charges for such services as copying, search, and certification of Government records pursuant to the authority of Title V of the Independent Offices Appropriation Act of 1952 (31 USC 483a) and as directed by Office of Management and Budget Circular No. A-25. In general, these fee schedules are based on the costs of using non-professional staff to meet requests for information of a routine nature. However, they are inadequate to cover the costs of professional staff time that must be employed in searching, screening, excerpting, and editing that is associated with the occasional broad and massive request for Government records. In the absence of clear policy guidance to agencies on how to reconcile general user charges policies with the spirit of the Freedom of Information Act, agencies have been reluctant to impose charges to recover the costs of these massive requests, and several have had to divert large amounts of professional staff resources to providing the requested information.

Non-uniformity of charges.—User charges that have been established to recover the costs of copying, certification, and routine search vary among agencies. Charges for search vary from \$3.00 to \$5.00 per hour, certification charges range from \$.50 to \$5.00, and copying charges are set from \$.07 to \$1.00 per page. In addition, practices also vary in such matters as exempting the first quarter-hour or half-hour of search time, the establishment of minimum fees, etc. Although some of the variations in charges are within the bounds of what one would expect to be differences in actual costs, the committee was particularly concerned about the range of charges for copying services. Flat rates of up to \$1.00 per page are clearly too high in instances where several copies of the same page are provided. These excessive charges have been the subject of recent criticism by an Administrative Conference Report and newspaper articles.

These are significant problems. We believe that some policy guidance is necessary to resolve them and that this guidance can be accomplished in an effective manner that will minimize any criticism or misunderstanding of the Administration's commitment to the intent of the Freedom of Information Act. Our analysis of the situation, alternative actions, and recommendations are presented below.

Insufficient cost recovery. A failure to provide any guidelines to agencies on user charges policy for massive requests will perpetuate the existing problems—which are a heavy burden for some small agencies (such as the Renegotiation Board) and a growing problem for others. Such guidance could be provided either formally or informally.

Agencies already have the authority to impose charges for such requests under Title V of the Independent Offices Appropriations Act of 1952 (31 USC 483a)

that requires that user charges be "as uniform as practicable and subject to such policies as the President may prescribe." OMB's Circular No. A-25, "User Charges," has, since 1959, provided general policy guidance on user charges. However, Circular No. A-25 is not explicit on charges for searching, copying, and certifying records.

Alternative No. 1. No action.

Alternative No. 2. Provide formal guidance through an OMB Circular.

Alternative No. 3. Resolve the issue informally. Specifically, in discussing massive requests with agency counsels, the Department of Justice could be asked to advise them that: (a) agencies have the legal authority to charge for such requests under 31 USC 483a and OMB Circular No. A-25; and (b) that OMB is aware of the problems imposed by massive requests and would not object to agency actions to impose charges, provided that the charges do not exceed actual costs and the records requested are primarily of value to the recipient rather than to the general public. Such advice would not be given generally, but on a selective basis when Justice believes it would be appropriate. There would be no difficulty in gaining the cooperation of the Department of Justice staff on this approach.

Recommendation: Alternative 3. Some action is needed, but formal guidance is not essential and would create the appearance that the Administration is trying to frustrate the Freedom of Information Act.

Non-uniformity of charges. If no action is taken to reduce excessive charges, the Administration will be subject to the criticism that it is permitting agencies to frustrate the intent of the Freedom of Information Act. The wide range of charges for seemingly identical services lends credence to the criticism that the charges at the upper end of the range are intended to deter requests for information.

Alternative No. 1. No action.

Alternative No. 2. Issue an OMB Circular on charges for searching, copying, and certifying records. (Actually, OMB would be reissuing (after necessary revision) what formerly existed as Circular No. A-28.)

Alternative No. 3. Send a letter and/or model fee schedule to agencies asking (or instructing) them to reduce excessive fees.

Either Alternative No. 2 or Alternative No. 3 would have the advantage of supporting the intent of the Freedom of Information Act.

Recommendation: Alternative No. 3. Some action is appropriate, but complete definition of user charges policies by a Circular is not necessary to effect a reduction in excessive charges.

We believe that some policy guidance is necessary as both a legal and practical matter to resolve the problems of applying user charges to services provided under the Freedom of Information Act. It is our view that the actions recommended above offer a reasonable compromise between the need for such guidance to agencies and the desire to avoid undue criticism or misunderstanding of the Administration's commitment to the Freedom of Information Act.

Mr. Robert Saloschin of the Department of Justice (187-2674) and Mr. Lynn Etheredge (Ext. 3945) of this committee are available to discuss specific aspects of this study and its recommendations with you and your staff.

Mr. Robert Saloschin, Miss Fredericka Paff, Department of Justice

Mr. Lynn Etheredge, Mr. Egils Milbergs, Office of Management and Budget.

Mr. Herbert Angel, General Services Administration.

[Circular No. A-25, Sept. 23, 1959]

EXECUTIVE OFFICE OF THE PRESIDENT,

BUREAU OF THE BUDGET,

Washington, D.C.

To the Heads of Executive Departments and Establishments.

Subject: User Charges.

1. *Purpose.* Bureau of the Budget Bulletin No. 58-3 of November 13, 1957, set forth some general policies for developing an equitable and uniform system of charges for certain Government services and property. This Circular incorporates the policies contained in that Bulletin and gives further information with respect to: (a) the scope of user charge activities; (b) guidelines for carrying out the approved policies; and (c) agency submission of periodic status reports. It

also prescribes Standard Form No. 4 on which periodic status reports are required.

Because this Circular applies also to the areas previously covered by Bureau of the Budget Circular No. A-28 of January 23, 1954, that Circular is hereby rescinded.

2. *Coverage.* Except for exclusions specifically made hereafter, the provisions of this Circular cover all Federal activities which convey special benefits to recipients above and beyond those accruing to the public at large. The specific exclusions which continue to be governed by separate policies are fringe benefits for military personnel and civilian employees; sale or disposal under approved programs of surplus property; postal rates; interest rates; and fee aspects of certain water resources projects (power, flood control, and irrigation). In addition this Circular does not apply to activities of the legislative and judicial branches, the municipal government of the District of Columbia, the Panama Canal Company or the Canal Zone Government.

3. *General policy.* A reasonable charge, as described below, should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit.

a. *Special services.*

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than this which accrue to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public (e.g., licensing of new biological products).

b. *Lease or sale.* Where federally owned resources or property are leased or sold, a fair market value should be obtained. Charges are to be determined by the application of sound business management principles, and so far as practicable and feasible in accordance with comparable commercial practices. Charges need not be limited to the recovery of costs; they may produce net revenues to the Government.

4. *Agency responsibility.* The responsibility for the initiation, development, and adoption of schedules of charges and fees consistent with the policies in this Circular continues to rest with the agency. Each agency shall:

a. Identify the services or activities covered by this Circular;

b. Determine the extent of the special benefits provided;

c. Apply accepted cost accounting principles in determining costs;

d. Establish the charges; and

e. In determining the charges for the lease and sale of Government-owned resources or property, apply sound business management principles and comparable commercial practices.

5. *Cost, fees and receipts, and their determination.*

a. *Determination of costs.* Costs shall be determined or estimated from the best available records in the agency, and new cost accounting systems will not be established solely for this purpose. The cost computation shall cover the direct and indirect costs to the Government of carrying out the activity, including but not limited to:

(1) Salaries, employee leave, travel expense, rent, cost of fee collection, postage, maintenance, operation and depreciation of buildings and equipment, and personnel costs other than direct salaries (e.g., retirement and employee insurance);

(2) A proportionate share of the agency's management and supervisory costs;

(3) A proportionate share of military pay and allowances, where applicable;

(4) The costs of enforcement, research, establishing standard, and regulation, to the extent they are determined by the agency head to be properly chargeable to the activity.

b. *Establishment of fees to recover costs.* Each agency shall establish fees in accordance with the policies and procedures herein set forth. The provisions of this Circular, however, are not to be construed in such a way as to reduce or eliminate fees and charges in effect on the date of its issuance. The maximum fee for a special service will be governed by its total cost and not by the value of the service to the recipient. The cost of providing the service shall be reviewed every year and the fees adjusted as necessary. In establishing new fees and increasing existing fees the agency may make exceptions to the general policy (paragraph 3, above) under such conditions as illustrated below.

(1) The incremental cost of collecting the fees would be an unduly large part of the receipts from the activity.

(2) The furnishing of the service without charge is an appropriate courtesy to a foreign country or international organization; or comparable fees are set on a reciprocal basis with a foreign country.

(3) The recipient is engaged in a nonprofit activity designed for the public safety, health, or welfare.

(4) Payment of the full fee by a State, local government, or nonprofit group would not be in the interest of the program.

c. *Disposition of receipts.* Legislative proposals shall generally avoid disturbing the present rule that collections go into the general fund of the Treasury as miscellaneous receipts. However, exceptions may be made where:

(1) It is intended that an agency or program or a specifically identifiable part of a program be operated on a substantially self-sustaining basis from receipts for services performed or from the sale of products or use of Government-owned resources or property.

(2) The agency can show that the initiation or increase of fees or charges is not feasible without earmarking of receipts.

(3) The receipts are in payment of the cost of authorized special benefits for which the demand is irregular or unpredictable, such as inspections performed upon request outside the regular duty hours.

This Circular is not intended to change the present system of sharing with States and counties receipts from the lease of certain lands and the sale of certain resources.

6. *Changes in existing law.* In cases where collection of fees and charges for services or property in accordance with this Circular is limited or restricted by provisions of existing law, the agencies concerned will submit appropriate remedial legislative proposals to the Bureau of the Budget under the established clearance procedure, as provided in Bureau of the Budget Circular No. A-19.

7. *New activities.* In the establishment of new Federal activities which would provide special benefits, the agencies concerned are to apply the policies and criteria set forth in this Circular.

8. *Reports to the Bureau of the Budget.* Each agency shall make a report by December 31, 1959, for each bureau or comparable organizational unit, of the costs and charges for all services or property covered by this Circular, and shall also make a report of changes not later than December 31 of each succeeding year as a result of its annual review of such costs and charges. The initial report for any new agency hereafter established (including those established by reorganization) shall be submitted on December 31 following the end of the first fiscal year during which the agency was in operation. Each report shall cover the situation as of the preceding June 30, and shall be prepared in accordance with the instructions set forth in the attachments to this Circular.

By direction of the President:

MAURICE H. STANS, *Director.*

(Attachments.)

[Attachment A, Circular No. A-25]

INSTRUCTIONS FOR THE PREPARATION OF ANNUAL REPORTS ON USER CHARGES

1. *Form and coverage of reports.* Reports shall be prepared on Standard Form No. 4, as illustrated in Attachment B. An original and two copies will be required.

The initial report should represent a complete inventory of all services of the agency which provide a special benefit to recipients above and beyond those accruing to the public at large, and all activities under which federally owned resources or property are or could be sold or leased.

Subsequent reports covering the annual review of costs and charges shall cover only (a) services and activities not reported earlier; (b) services and activities for which charges have been changed; and (c) services and activities for which changes in the applicable category (as described below) have taken place.

2. Preparation of Standard Form No. 4.

a. A separate form will be prepared for each of the following categories, where applicable:

(1) Special services for which existing charges are producing full cost recovery; and lease or sale activities which are returning fair market value.

(2) Special services for which existing charges are producing less than full cost recovery; and lease or sale activities for which less than fair market value is being obtained.

(3) Special services and activities for which no charges are currently being made, and for which charges are apparently required by the provisions of this Circular.

(4) Special services and activities for which no charges are to be made in accordance with the policy guidelines and exceptions provided in this Circular.

(5) Services and activities which have been discontinued or transferred to other agencies since the previous report. (This category is not applicable to the initial report.)

The category of items covered by each form will be identified in the heading by placing an "X" in the box corresponding with the number of the category as shown above. Forms need not be submitted for categories in which there is nothing to be reported.

b. Columns on the form will be completed as follows:

(1) Enter the identification number for the service or activity. Each service and activity shall be assigned an identification number which shall be retained from year to year, to facilitate identification in future annual reports. Agencies may devise their own coding systems for this purpose.

(2) List each special service provided under a heading "Special services", and each lease or sale activity under a heading "Lease or Sale."

(3) Enter the unit for measuring the service or property provided.

(4) Enter the amount of the charge being made for each unit as of the preceding June 30. In cases where there are various rates for differing situations, a summary schedule of rates may be attached in lieu of listing each rate individually.

(5) Enter the date the charge shown in column 4 became effective.

(6) Enter the amount of the charge which was made previous to the date in column 5.

(7) Enter the number of units of activity for the last completed fiscal year.

(8) Enter (in thousands of dollars) the cost of providing the service or the fair market value of resources or property sold or leased.

(9) Enter (in thousands of dollars) the amount of collections (net of refunds) during the last completed fiscal year.

(10) Enter the symbol of the receipt account, appropriation account, or fund account (excluding deposit funds) to which the collections were or will be credited.

(11) Enter any pertinent explanatory comments relating to the information shown in the preceding columns. On reports covering categories 2, 3, and 4, specifically note in this column, for each item, the reason(s) that full cost recovery of fair market value is not obtained. Also indicate whether full cost recovery for special services or fair market value for lease and sale activities can be obtained under existing law; the status of specific legislative proposals (e.g., under study, drafted, cleared, introduced, or reported); and the status of proposed administrative changes in fees and charges, including effective dates.

On reports subsequent to the initial report, indicate in this column the previous category in which the item was reported. On reports covering category (5), identify the services and activities transferred to other agencies or organizational units and the agency or organizational unit to which the transfer was made.

USER CHARGES REPORT, CATEGORY 1 (DEC. 15, 1959)

Activity, fiscal year 19											
Identification number	Special services or activities	Charge as of June 30				Volume	Cost or fair market value		Collections		Remarks
		Unit	Amount	Date established	Previous charge		Amount (thou-sands)	Amount (thou-sands)			
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	
PA-101	Special services: Licenses under Federal Licensing Act.	Application and re-newal.	Schedule	Dec. 12, 1958	Schedule	10, 155	\$195	\$200	740899	See fee schedules attached.	
PA-102	Entrance to Central National Park	Permit	\$1.00 per car	July 7, 1958	\$0.75	49,765	48	50	740810		
PA-103	Registration of documents	Document	2.00	Nov. 20, 1957	1.75	3,789	8	8	7490100		
PA-105	Sale or lease: Lease of land for commercial purposes	Acre	3.00 to 12.50	May 13, 1957	2.00 to 11.50	12,250	52	52	741830		

USER CHARGES REPORT, CATEGORY 2 (DEC. 15, 1959)

Identification number	Special services or activities	Activity, fiscal year 19									
		Charge as of June 30					Collections				
		Unit	Amount	Date established	Previous charge	Volume	Cost or fair market value (thou-sands)	Amount (thou-sands)	Symbol	Remarks	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	
PA-104	Sale or lease: Rental of floor space for business concessions	Ft ²	10.00	June 18, 1959	8.00	8,150 to 10,000	85	79	745999	1,850 ft ² rented for part of year only	

[Circular No. A-25, Transmitted Memorandum No. 1, Oct. 22, 1963]

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C.

To the Heads of Executive Departments and Establishments.
Subject: User charges.

1. *Purpose.* This transmittal memorandum amends Circular No. A-25 of September 23, 1959: (a) to change the date on which annual reports are due in the Bureau of the Budget, (b) to provide for additional information with regard to receipts derived from user charges and (c) to require the submission of a user charges inventory every fifth year beginning with the fiscal year 1964.

2. *Annual status reports to the Bureau of the Budget.* Paragraph 8 of the Circular is amended to read:

"Each agency shall make a report to the Bureau of the Budget by September 30 of each year (except that the report for the fiscal year 1963 is due November 30, 1963), for each bureau or comparable organizational unit, giving the following information as of the preceding June 30:

"a. All changes in costs or charges for services or property covered by the Circular, as well as the establishment of new user charges. This report will be based on the agency's annual review of such costs and charges. (See Attachments A and B).

"b. Total collections from user charges during the fiscal year. Negative reports for subsection a need not be submitted; however, in those instances, the report required by subsection b must be submitted."

New Attachments A and B supersede the attachments to the original Circular.

3. *User charges inventory.* The Circular is amended by adding a new paragraph 9 as follows:

"Beginning with the report due September 30, 1964, and every fifth year thereafter, each agency will submit a complete inventory of all user charges in effect on the preceding June 30. This report will be submitted in lieu of the report required by section 8a for those years.

"The initial report for any new agency hereafter established (including those established by reorganization) shall be submitted by September 30 following the first fiscal year during which the agency is in operation. This report will be an inventory of all costs and charges for services or property covered by this Circular."

KERMIT GORDON,
Director.

(Attachments.)

[Attachment A, Circular No. A-25, Transmittal Memorandum 1]

INSTRUCTIONS FOR THE PREPARATION OF ANNUAL REPORTS ON USER CHARGES

1. *Form and coverage of reports.* Reports required by this Circular shall be prepared on Standard Form No. 4 (see Attachment B). Annual status reports will cover the changes in costs and charges for services and property and the establishment of new user charges occurring since the last report. Negative reports are not required.

Each status report will be accompanied (or if no status report is required, submitted alone) by a table showing total amounts collected from user charges for the preceding year. This table should show a total for amounts deposited to miscellaneous receipts, without identifying the receipt accounts to which the deposit was made. Collections deposited to the credit of appropriations or funds (reimbursements to appropriations, trust funds, and revolving and management funds) should be separately listed, identified by account title and symbol, and the amount credited to each.

Initial reports of new agencies and the inventory report required every five years, should represent a complete record of all services of the agency which provide a special benefit to recipients above and beyond those which accrue to

the public at large, and all activities under which federally owned resources or property are or could be leased or sold.

2. Preparation of Standard Form No. 4.

a. A separate form will be prepared for each of the following categories, where applicable:

(1) Special services for which existing charges are producing full cost recovery; and lease or sale activities which are returning fair market value.

(2) Special services for which existing charges are producing less than full cost recovery; and lease or sale activities for which less than fair market value is being obtained.

(3) Special services and activities for which no charges are currently being made, and for which charges are apparently required by the provisions of this Circular.

(4) Special services and activities for which no charges are to be made in accordance with the policy guidelines and exceptions provided in this Circular.

(5) Services and activities which have been discontinued or transferred to other agencies since the previous report. (This category is not applicable to the inventory reports.)

The category of items covered by each form will be identified in the heading by placing an "X" in the box corresponding with the number of the category as shown above. Forms need not be submitted for categories in which there is nothing to be reported.

b. Columns on the form will be completed as follows:

(1) Enter the identification number for the service or activity. Each service and activity shall be assigned an identification number which shall be retained from year to year, to facilitate identification in future annual reports. Agencies may devise their own coding system for this purpose. Agencies may revise identification numbers on inventory reports.

(2) List each special service provided under a heading "Special services," and each lease or sale activity under a heading "Sale or lease."

(3) Enter the unit for measuring the service or property provided.

(4) Enter the amount of the charge being made for each unit as of the preceding June 30. In cases where there are various rates for differing situations, a summary schedule of rates may be attached in lieu of listing each rate individually.

(5) Enter the date of the charge shown in column 4 became effective.

(6) Enter the amount of the charge which was made previous to the date in column 5.

(7) Enter the number of units of activity for the last completed fiscal year.

(8) Enter (in thousands of dollars) the cost of providing the service or the fair market value of resources or property sold or leased.

(9) Enter (in thousands of dollars) the amount of collections (net of refunds) during the last completed fiscal year.

(10) Enter the symbol of the receipt account, appropriation account, or fund account to which the collections were credited. In cases where payments are credited to deposit funds until earned, report only the amounts actually paid to other accounts.

(11) Enter any pertinent explanatory comments relating to the information shown in the preceding columns. On reports covering categories 2, 3, and 4, specifically note in this column, for each item, the reason(s) that full cost recovery or fair market value is not obtained. Also indicate whether full cost recovery for special services or fair market value for lease and sale activities can be obtained under existing law; the status of specific legislative proposals (e.g., under study, drafted, cleared, introduced, or reported); and the status of proposed administrative changes in fees and charges, including effective dates.

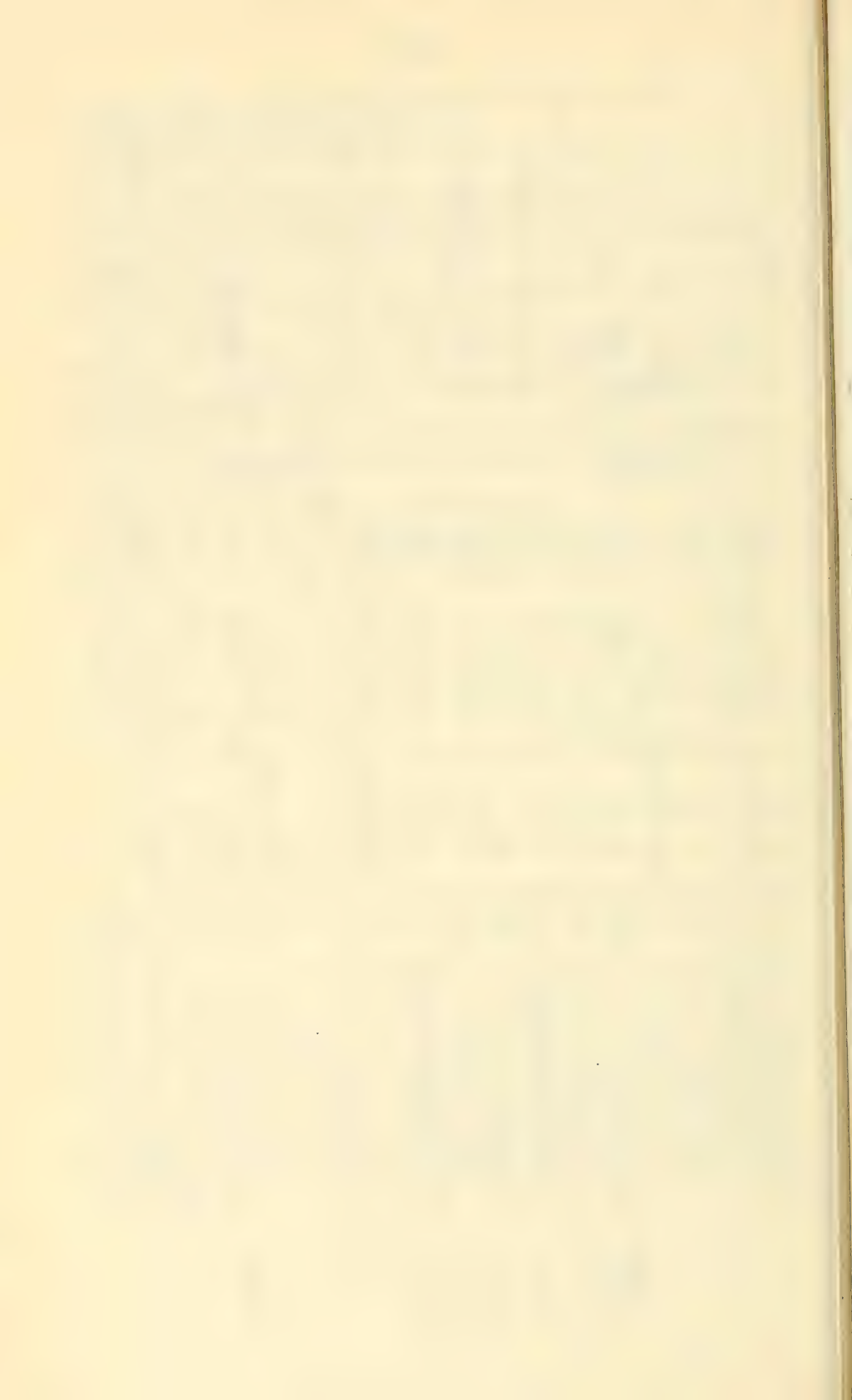
Where there has been a change in category for an item, indicate in this column the previous category in which the item was reported. On reports covering category (5), identify the services and activities transferred to other agencies or organizational units and the agency or organizational unit to which the transfer was made.

USER CHARGES REPORT, CATEGORY 1 (SEPT. 15, 1963)

Identification number (1)	Special services or activities (2)	Charge as of June 30				Activity, fiscal year 1963					Remarks
		Unit (3)	Amount (4)	Date established (5)	Previous charge (6)	Volume (7)	Cost or fair market value		Collections		
							(thou- sands)	(8)	(9)	Account symbol (10)	
Special services:											
PA-101	Licenses under Federal Licensing Act	Application and renewal	Schedule	Dec. 12, 1958	Schedule	10,155	\$195	\$200	740899	See fee schedules attached.	
PA-102	Entrance to central National Park	Permit	\$1.00 per car	July 7, 1958	\$0.75	49,765	48	50	740810		
PA-103	Registration of documents	Document	2.00	Nov. 20, 1957	1.75	3,789	8	8	749000	Reported in category 2 for fiscal year 1962.	
PA-105	Sale or lease: Lease of land for commercial purposes.	Acre	3.00 to 12.50	May 13, 1957	2.00 to 11.50	12,250	52	53	741830		

USER CHARGES REPORT, CATEGORY 2 (SEPT. 15, 1963)

Identification number	Special services or activities	Charge as of June 30				Activity, fiscal year 1963				
		Unit	Amount	Date established	Previous charge	Volume	Cost or fair market value (thou- sands)	Collections		Remarks
								Amount (thou- sands)	Account symbol	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	
	Sale of lease: Rental of floor space for business con- ft ²		10.00	June 18, 1979	8.00	8,150 to 10,000	85	79	745999	1,580 ft ² rented for part of year only.
PA-104	cessions.									



FREEDOM OF INFORMATION

PART 4—FREEDOM OF INFORMATION REPORTS AND RECOMMENDATIONS

A STATUS REPORT ON THE RESPONSIVENESS OF SOME FEDERAL AGENCIES TO THE PEOPLE'S RIGHT TO KNOW ABOUT THEIR GOVERNMENT

(By Ralph Nader, et al.)

A well informed citizenry is the lifeblood of democracy, for in all arenas of government, information, particularly timely information, is the currency of power. The criticality of information is illustrated in the reply of the Washington lawyer to one who asked him how he prevailed on behalf of his clients: "I get my information a few hours ahead of the rest."

In this nation, where the ultimate power is said to rest with the people, it is clear that a free and prompt flow of information from government to the people is essential to replace the myth of democratic pretense with the reality of citizen access to a just governmental process. It was with these truths in mind that Congress passed, after a decade of temporizing, the Freedom of Information Act (FOIA) in 1966. The Act became effective on July 4, 1967. When President Johnson signed the bill into law on July 4, 1966 he stated: "I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted."

It is apparent that intention far exceeds performance when it comes to statements by public officials about freedom of information policy. Never has a theoretical consensus hovered around such a shambles of divergent reality. The Freedom of Information Act, designed to provide citizens with tools of disclosure, has been regressively forged into a shield against citizen access. It is important to remember that the FOIA is a unique statute. Its spirit encourages government officials to display an "obedience to the unenforceable." For insofar as the statute is enforceable, the duty devolves to the citizen. Few citizens are able to engage an agency in court—the only recourse afforded by the Act. Those who can afford judicial recourse are special interest groups who need the protection of the FOIA least of all. Consequently, as a practical matter, the attitude of agency officials toward the rights of the citizenry overwhelmingly determines whether the FOIA is to be a pathway or a roadblock.

After three months of exploring the frontiers of the Freedom of Information policy of several federal agencies, with one hundred students working in study groups coordinated by the undersigned, we have reached a disturbing conclusion: that government officials at all levels in many of these agencies have violated systematically and routinely both the purpose and specific provisions of the law. These violations have come so regularly and with such cynicism that they seriously block citizen understanding and participation in government. There is prevailing an official belief that these federal agencies will not stand for searching inquiries, or even routine inquiries that appear searching because of their rarity, from its citizens.

The term "citizens" is used in this context to refer to any person or persons who are not regulated by the agency and who do not constitute an organized, special interest group. The distinction is important because most agencies have a two-pronged information policy—one toward citizens and one toward the special interest groups that form the agency's regulatory constituency. For the latter, a pattern has emerged of preferential access and treatment over the years. The

lobbyists, the trade associations, and the corporations have made the contacts, have developed the institutions (e.g., industry advisory councils) and have generally compromised or intimidated the agency personnel into affording them entry into the early decisional process prior to public surfacing of rule-making, advanced rule-making, policy speeches, and the like. And it is during the inner council discussion stage, the draft-report or draft-standard stage that most of the decisions are made. The options for public impact at later, public stages narrow very rapidly when there is an established system of preferential access to industry or commercial groups. As is well known to the Washington press corps, this process occurs in the Department of Interior with the oil and coal industries, and with the federal banking agencies and the banking industry—to name two of the more egregious wedlocks.

The relationship between free access to information and responsible government is very direct. All of the agencies we have studied enjoy large discretionary power over the programs they administer. Under the agency's legal structure, they can go one way or another; they can delay action, decide what portions of the law to enforce or not enforce, and even adamantly refuse to carry out programs mandated by Congress. These agencies are more agencies of discretion than they are of law. Within limits, this is often necessarily the case, but without free and fast information to the public, discretion more easily becomes an absolutism or tyranny for the common citizen.

Professor Kenneth C. Davis defined discretion in this way:

"A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction. Discretion is not limited to what is authorized or what is legal but includes all that is within 'the effective limits' on the officer's power. This phraseology is necessary because a good deal of discretion is illegal or of questionable legality. Another facet of the definition is that a choice to do nothing—or to do nothing now—is definitely included; perhaps inaction decisions are ten or twenty times as frequent as action decisions. Discretion is exercised not merely in final dispositions of cases or problems but in each interim step; and interim choices are far more numerous than the final ones. Discretion is not limited to substantive choices but extends to procedures, methods, forms, timing, degrees of emphasis, and many other subsidiary factors."

The Freedom of Information Act which came in on a wave of liberating rhetoric is being undermined by a riptide of bureaucratic ingenuity. "The law was initiated by Congress and signed by the President with several key concerns," says a 1967 Attorney General's Memorandum. These are: "—that disclosure be the general rule, not the exception; that all individuals have equal rights of access; that the burden be on the Government to justify the withholding of a document, not on the person who requests it; that individuals improperly denied access to documents have a right to seek injunctive relief in the courts; that there be a change in Government policy and attitude."

The Act then explicitly provides for nine exemptions which offer a vast amount of discretion—so vast that to call these exemptions loopholes would be to indulge in the grossest kind of understatement. Exemptions for "internal communications," for material deemed to be compiled for investigatory purposes, for information "given in confidence," are agency favorites. Federal Trade Commission officials have discovered that merely instructing a secrecy to open an investigatory file and dropping the item in it serves to take care of the FOIA. And as more people are learning, FTC investigational files have every potential of lying, fossil-like, undisturbed by the concern of bureaucratic man.

The broad ambit of discretion, worked upon by agencies which differ in their degree of commitment to public and special interests, is also leading to differing and inconsistent proliferation of practices and interpretations. Each agency has created its unique "common law" in interpreting the act and in developing a maze of confusing regulations. Information which is claimed to be exempt from disclosure in one agency is freely given in another agency. (For example, records of advisory council meetings—United States Department of Agriculture—no, National Highway Safety Bureau—yes. The Federal Extension Service (USDA) gave the students permission to ask the Inspector General to see the audits; the Farmers Home Administration did not.)

Agencies also differ in the depth of the "appeals tier" within the agency which a petitioner must exhaust before he can go to the courts for relief. Each appeals point on the tier increases the probability of exhausting the petitioner and mooting the quest, especially when each internal appeal takes weeks or months. Con-

sumer Union's experience with the Veterans Administration is a good example of how much stamina and resources a petitioner requires to obtain test results of so mundane a product as hearing aids.

There is little doubt that if government officials display as much imagination and initiative in administering their programs as they do in denying information about them, many national problems now in the grip of bureaucratic blight might become vulnerable to resolution.

The particular intransigence characterizing refusals to provide requested information by various agencies studied this summer is noteworthy. These are not agencies in the "sensitive category." They do not deal with military or foreign affairs. They are entrusted with the most sympathetic missions in the governmental arena—health, safety, food purity and distribution and transportation. Yet even under daily approach and reasoned requests, these agencies refused to provide information, some of which is described below. One can imagine the chances of a citizen writing in from Kansas or Oregon.

What follows is a focus on those agency acts which violate or misinterpret the Freedom of Information Act. However, it is encouraging to take note of the many public servants in the federal government who have respect for the purpose of the FOIA and who frequently bridle under restrictions by their superiors that they believe wholly unjustified. The benefits of the openness of these civil servants, who have provided accurate information to the students as well as to any other interested persons, have been to further the interest in citizen involvement. Not only have the students been able to obtain a more comprehensive picture of the workings of their government, but agency personnel have in many cases received important insights and feedback from the dialogue they have established with the students. By a significant margin, the National Air Pollution Control Administration (HEW) has displayed the most open position on information access. Against this standard of performance, other agency restrictions become even more outrageous as to their ulterior purposes in protecting incompetence and cloaking regulatory surrenders to special interests—e.g., non-enforcement of the laws governing the behavior of corporations.

It is now appropriate to describe some of the concrete instances of government secrecy and the techniques used to exhaust petitioners from persisting in their quest.

1. The FOIA provides a specific exemption from mandatory disclosure for material which is an "investigative file." The text says:

"[no disclosure is required of] investigative files compiled for law enforcement purposes, except to the extent available by law to a private party."

The intent of this exemption was to protect that kind of investigative material which if revealed would undermine law enforcement. Thus, in order for material to qualify as an "investigative file," it must be both investigatory in nature and capable of being used in a law enforcement proceeding. That is, even "investigatory" parts of the file are only exempt for so long as they can be used in a law enforcement proceeding, i.e., if law enforcement is still possible, those investigative parts of the file which relate to that enforcement may also still be privileged. When any prosecution proceedings are completed or precluded by other factors, then the entire file should be open—unless other investigative files would be directly impaired by its disclosure. The fore-going is the broadest possible interpretation that can be taken of that provision in the Act.

Several agencies have not been satisfied, however, with even these broad limits on the "investigative file" principle, so they have expanded and transmuted its character by changing the definition of what is an investigatory file. For example, the Department of Labor has denied public access to their records of past (5, 10, and 15 years old) violations of the Walsh Healey Act which sets minimum wages and safety standards for businesses which have more than \$10,000 worth of sales to the Federal Government. The only sanction for violators is a 3 year bar from further contracts. Thus the Department of Labor keeps secret the nature of past violations which have ceased and are two decades old on the theory that the Labor Department might still get around to using these violations in some future law enforcement proceeding. The Department of Labor also restricts even their *record* of corporate violations of these Walsh Healey standards (rather than the investigative reports within the files). These records and the records of violations filed by inspectors are analogous to records of traffic tickets and were denied to students. In the selected industry reports (showing what companies had been inspected) the Labor Department blocked out the names of all companies inspected before allowing the students access. These denials were then

followed with a request for the students to sign a pledge of non-revelation in order to receive the documents.

Another illegal broadening of the "investigative file" exemption is invoked when other excuses fail. This is when the agency places public information in an investigatory file and then refuses to separate the two. For example, the Department of Labor has claimed that all material in all Walsh Healey files is "investigative" even when the requested material is non-investigative in nature. Thus, the Department secures secrecy by its own commingling and subsequent refusal to separate. The Department then completes its denial to the records of their enforcement of that Act.

2. The FOIA provides a specific exemption for internal governmental papers in order to preserve and encourage the freedom of internal communication within government and to prohibit premature disclosure. The text of that exemption says:

"(no disclosure is required of) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency."

The legislative history of this exemption makes it clear that, in judging whether non-disclosure was to be allowed, the prime criterion was to be the relative finality of resolution of the issue in any such document. The evil to be prevented by the exemption was, in the words of the House Report "premature disclosure."

In practice, several agencies have illegally broadened this exemption to deny access to matters relating to *past* decisions within the Executive Branch. The Department of Agriculture has gone further and denied access to the minutes of the National Food Inspection Advisory Committee and the Poultry Advisory Committee. Those committees are made up of non-federal personnel, including private members, and their alleged purpose is to suggest policy and discuss new hazards to the public interest. The Department wants to prevent the public from realizing what an impact private interest groups and their state satellites have on meat and poultry inspection policy and what conditions and new hazards exist.

The Interstate Commerce Commission has also invoked this exemption to deny public access in specific areas to records of Congressional correspondence with the ICC. Also the ICC has declined to release a six year old study of the ICC made for it by the Civil Service Commission. The ICC has also refused to make public the past evaluations of ICC performance which were prepared by ICC personnel. Thus, no information is released as to how the agency assesses its performance. The public usefulness of a contrary policy was seen a few weeks ago when an internal FDA evaluation report was made public. The Department of Labor has misused this exemption to deny public disclosure of their interpretations of the Walsh Healey Act—made in 1936—even though that Act has been amended several times since and the public need for this information is essential if any determination of how the law has been administered over the last 33 years is to be made.

Other illustrations reflect the variety of excuses for denials. The Department of Defense has denied access to information on the quantity of oil being pumped from the bilges of naval ships on the grounds that this data will be included in a report which contains operational data relative to military characteristics and will therefore be classified. The water pollution study group wanted information about oil dumping. The Defense Department makes no claims that the specific information requested is itself classified or in any way exempt from the FOIA. DOD is a past master of the 'contamination technique'—take several doses of unclassified material that may prove embarrassing and mix them with other doses of classified information and, lo and behold, the sum is entirely classified. Civilian agencies have been quick to deploy this method.

The Federal Water Pollution Control Administration has denied access to copies of research proposals made to but not accepted by FWPCA. The study group wanted this information to assess the research priorities at the agency, to determine whether there was any unfair preference by FWPCA and to see what reasons were given for denial of such proposals.

Only under pressure from the study group and the New York Times did the ICC finally release information pertaining to the expense accounts of ICC Commissioners which were assumed by industry groups when the commissioners visited trade meetings.

Before continuing on to discuss even more flexible techniques for information suppression, the point must be made that most of the exemptions in the FOIA

are discretionary—that is, with the exception of other statutory restrictions and Executive Orders, the agency does not have to invoke the exemption. It is still expected to produce the information and not take advantage of the exemption without a strict shouldering of the burden. Instead, agencies are simply offering the particular exemption as a reason for denial and not producing the underlying facts which are entitled to invoke the exemption.

Agencies are developing ever refined ways to handle requests under FOIA. Here are some:

The typical tactic is to delay replying for several weeks and then state that the request for information was not specific enough. This tactic has enormous potential and agencies like it. First, if the agency does not permit the inquirer initial access to learn what specifics the agency has, he has no choice but to make a more general request. Any agency knows that one level of secrecy can lead to more exquisite levels of secrecy. So the organization or filing of the information possessed by the agency is not revealed. Consequently, the citizen is exposed to a charge of non-specificity. The more knowledgeable and fraternally received lobbyists, on the other hand, have no such problems. The Department of Agriculture, especially its Pesticide Regulation Division, has perfected this dismal science to a degree that it may uproot itself by the excess of its success.

The Department of the Interior used the delay technique with all the arrogant presumption of the new Assistant Secretary of Interior, Carl Klein. He developed a hamstringing system of centralized appointments and a centralized room for interviews to be conducted under the watchful eye of his monitors. In the initial three weeks of the study, the Department repeatedly denied information by cancellation or delay of scheduled meetings and by this monitoring device. An appeal to Herbert Klein, Director of Communications and Secretary Hickel was necessary to instruct Mr. Carl Klein in his duties to the public. He withdrew his edicts promptly. But other delays emerged. For example, the memo of FWPCA's assistant commissioner for enforcement (which outlined the enforceability of water quality standards) was released only after a 10-14 day delay after the initial request and an appeal to the DOI's information officer. The reason given for the delay was the assertion that this document was still in the working paper stage; however, the paper had already been completed and circulated. Since any work of man can always be perfected, the designation of "working paper" can have no discretionary limits which is another way of saying that the agency who exploits this technique becomes a law unto itself.

A closely related response to the "working paper" one is that the information is still not verified or is in incomplete form. The FWPCA gave the latter as the reason for refusing, following a ten-day delay, a student permission to see reports on the status of water pollution abatement programs at 20 federal installations. There is a written demand pending to see the information in whatever form it exists since we have taken the position that the agency's laxity in compiling this information is a self-serving and illegal basis for denial of access. This request for the status reports on 20 installations was made after FWPCA denied more detailed information about the entire problem on the ground that this general information would give the researcher a "warped impression." (At another time this same researcher was told that release of information would endanger Interior's relationship with DOD "because DOD is finicky about releasing figures on total sewage." Presumably, the enemy could then rush back to its abacus and calculated the manpower strength of the base. Sewage from domestic military bases is a national security matter, according to FWPCA. It could co-incidentally be a national pollution matter that is the basis of the reluctance.)

More primitive responses come forth as an agency loses its last reedy rationalizing props for withholding information. Relevant materials on pesticides in the Department of Agriculture * disappeared, on the action of a high official, after the students began researching them with permission at the Pesticides Regulation Library. Outright lies are not unknown as shown by the attached appendix II describing in greater detail the Civil Aeronautics Board experience. The National Highway Safety Bureau has denied any knowledge of preferential release to General Motors in late June of an Army medical team report on offbase accidents involving servicemen in Europe. But it was sent to GM privately. Since the company has recalled several million cars for a carbon monoxide hazard, GM can be forgiven its urgent interest in a medical report showing high CO levels in the

*See Appendix I for additional USDA denials.

automobile crash victims blood. But why not let all the people know at the same time? The report is being released today.

The Food and Drug Administration, which has been more cooperative than some of the other agencies in releasing information to the study group about food purity regulation (perhaps because it has so little to reveal) claimed through an official spokesman that it maintained no brand name list of beverages containing cyclamate. Such a list, however, had been used repeatedly to answer specific inquiries about specific brand names. On learning that the inquirer was part of the summer study group, the agency made the list available. This illustrates that whatever difficulty we may be having, the lone citizen making inquiry by mail from afar or even by visiting the agency is subjected to more government secrecy.

Another generic technique of preferential treatment is to compile the kinds of information that industry desires but decline to compile the information that a consumer or laborer could use. The Department of Interior compiles much information of use for the minerals industry but very little benefits consumers or workers. The Interior Department had to be pushed and prodded to develop a report on environmental depredations of the coal industry, after half a century, and then was reluctant to make it public. Consumer-related information about federal oil policy—from quotas to offshore leases—have been most hard to elicit from Interior. The same imbalance prevailed for hazards in off-shore drilling.

Search costs and reproduction costs can daunt a citizen after he has secured access to agency information. Copying fees range from no charge in some agencies to \$1.00 a page in other agencies. Similarly, some agencies charge no search fees, other charge up to \$7.20 per hour. Why the difference?

In conclusion, what are some lessons to be learned? First, the Freedom of Information Act is not being used by the public to secure relief in the courts. Since the effective date of the FOIA on July 4, 1967, court records reveal that 40 cases were brought under the FOIA (to March, 1969). Thirty-seven of these cases involved actions by corporations or private parties seeking information relating to personal claims or benefit. In only three cases did the suits involve a clear challenge by or for the right of the public at large to information. Even more significant, no records have come to our attention of any court actions initiated by the news media who should be the prime public guardians and litigators under the FOIA. Patently, the effect of the FOIA cannot be measured by court cases. But just as patently, a mere 40 cases in the first 20 months of the Act's history are shocking. There need to be institutions, be they public interest law firms, Universities, Law School Law Reviews, newspapers, magazines or the electronic media, who systematically follow through to the courts on denials of agency information. The individual citizen just does not have the resources.

The FOIA will remain putty in the hands of narrow-minded government personnel unless its provisions are given authoritative and concrete interpretation by the courts. Such litigation then feeds back a deterrence that radiates throughout an agency. Many general counsels of agencies are straining the Act to its utmost and beyond because of the improbability of judicial review. The new General Counsel of the Federal Highway Administration, David Wells, has already begun to apply the Byzantine secrecy that he learned from his former railroad and trucker employers. He now wants to prevent disclosure of violations of automotive safety standards to the public. Yet these violations are relayed quickly to the manufacturer involved. The corporation has the right to receive them but not the motorist who may become a casualty because of not knowing about the safety violations in his car or tires. David Wells will have much to learn and like his mentor, Francis Turner, will probably have to learn it all in public.

Second, Congress is not exercising adequate oversight over the way the FOIA is being observed. There have been no Congressional hearings since he Act was passed, although there is abundant material for a most worthwhile public hearing series. Two reports, one from the House and one from the Senate, have been published compiling the regulations and containing responses to some inquiries from the respective committees. Comprehensive Congressional hearings are a must.

Third, a Presidential review group should be constituted to eliminate the inconsistencies which now exist, and are increasing, among the FOIA compliance regulations of the various federal agencies. This group should also establish uniform ground rules which will make it exceedingly difficult to achieve devious and illegal circumventions of the FOIA. For example, there should be a clearcut injunction against the commingling tactic and agencies should be required to

separate or segregate the public information from what information may be legitimately withheld. For another example, there should be a one-stop appeal in the agency before judicial review. Stacking up layers of appeals within the agency is a strategy of attrition and facilitates divergent policies within the department or agency.

Fourth, each agency should be specifically required to (a) respond in some manner to all information requests within 7 days of receipt of such request or a specific reason given to justify further delay; (b) have available in the Washington office, and elsewhere as needed, a public information reading room with access to copying machines; (c) prepare in advance and have available in the public reading room that data most typically requested of the agency and all relevant data showing workload, productivity, law enforcement activities and similar agency evaluation information, as well as agency-Congress and agency-public records. Such system will not only encourage more citizen interest—which should be a frontline policy of all agencies—but also will improve the efficiency of response to citizen requests.

Fifth, specific procedures should be developed for taking corrective actions when federal officials resort to harassment techniques or other actions contrary to the FOIA. The establishment of a Director of Communications earlier this year offers the opportunity to develop effective sanctions on agency leaders who generate or condone such secrecy. Without such review and sanctions from the White House, agencies will continue to thwart or violate the Act with impunity. The most important distinction between agency responses toward information requests is the distinction between the agencies' leadership. Clearly then, the most important factor in the Executive Branch for freedom of information is the President himself. And it is up to you, ladies and gentlemen of the fourth estate, to remind him continually of this first imperative.

Ralph Nader, Gary Sellers, Reuben Robertson, John Esposito, Harrison Wellford, James Turner, and Robert Fellmeth.

[Appendix I]

SOME INFORMATION EXPERIENCES WITH THE U.S. DEPARTMENT OF AGRICULTURE

1. Racial hiring charts for individual electric cooperatives financed by REA loans: although the REA's information office decided to give the information, the Department's Office of General Counsel removed it without telling REA. On appeal to the REA administrator, the charts were made available.

2. Information on the fat content of various brand name frankfurters tested by the Department since 1955. Denied.

3. The Farm Credit Administration's record on the recipients of FCA-approved loans. The FCA must approve loans of more than \$100,000 made by federal land banks, and other large loans made by the production credit boards. The FCA has refused several times to reveal the names or locations of the recipients, or the sizes or terms of the loans.

4. Results of the Federal Extension Service's study of its program operations in 60 counties, done in 1965 and 1966. Denied.

5. Lists of specific pieces of information that agencies consider exempt from disclosure under the Freedom of Information Act. Denied.

6. Minutes of meetings of the National Food Inspections Advisory Committee and the Poultry Advisory Committee. Denied.

7. Minutes of meetings of the Citizens Advisory Committee on Civil Rights, whose members were private citizens. Denied.

8. Records of any civil rights complaint—concerning either hiring problems or program discrimination—made against the Department. Each one of the agencies, as well as the Department's civil rights staff, has refused to tell us who has complained, how the complaints were investigated, and what the Department has done to correct any violations it found. Denied.

9. Audits done by the Department's Inspector General on various agencies. After all our requests for audits were routinely turned down, we asked to see summaries of some of the audit findings. This was refused. In one case, both the audited agency (the Federal Extension Service) and the state director whose program was under study (Dr. Marshall Hahn of VPI) gave us permission to see the OIG audit of extension programs in Virginia. Even so, the OIG refused.

10. Copies of memoranda or directives circulated in the Department to tell employees how to handle information requests in general and our summer study in specific. Denied.

11. The Pesticide Regulation Division's registration records for specific pesticide products, for instance the Shell Vapona No-Pest Strip. Denied.

12. Copies of a proposal by the Department's Program Review and Evaluation Committee for a new system to keep track of civil rights progress. After the Department refused to give us the chart, we informally asked an administrator and got the chart immediately.

13. Copies of civil rights compliance plans that state universities and land grant colleges have sent to the Federal Extension Service. FES regulations required the state colleges to prepare adequate plans in order to keep getting federal money for state extension programs. The FES has refused to reveal any details of the plans it has approved.

14. Records of any action the Department has taken to correct problems pointed out by a number of groups—the U.S. Civil Rights Commission, the Department of Justice, private citizens, and the Department's own Inspector General and Citizens Advisory Committee on Civil Rights. Denied.

15. All records of action the Pesticide Regulation Division has taken in a number of areas: seizing unsafe pesticide products; recalling products from the market; issuing citations to manufacturers of unsafe pesticides; and recommending prosecution of pesticide manufacturers. Denied.

16. Information about the Pesticide Regulation Division accident reporting system. The PRD refused to tell us how it evaluates accident reports and what action it has taken in response to the information.

17. Data that manufacturers submit to PRD when they have their products registered. The PRD claimed that all the information in the registration file is covered by the "trade secret" option, even though the specific product formula is contained in a brown envelope marked "confidential" and can be easily separated from the rest of the file.

18. Records of PRD's pesticide sampling program, which analyzes samples of pesticides from the market. We asked only for those files where no enforcement was planned, but PRD denied all the files, claiming they were exempt under the clause protecting enforcement records.

19. A Department of Agriculture report revealing health hazards in Talmadge-Aiken Act meat plants has been denied Congressmen Thomas Foley and Benjamin Rosenthal and United Press International. This denial has no time limit, as USDA admits that their investigation is closed in this matter.

[Appendix II]

THE CIVIL AERONAUTICS BOARD—A CASE STUDY OF INFORMATION POLICY AND THE PUBLIC INTEREST

The study of the CAB took as one of its primary areas of concern the ways in which the Board and the airlines industry deal with or fail to deal with complaints from members of the public. At the outset, statistical information was requested (in writing) as to the total number of complaints received by the CAB, the volume of complaints lodged against the various airlines, and the major categories and sources of complaints. The CAB refused to give this information on the grounds that it had inadequate personnel to keep any records of this sort. Not until the very end of the summer did we learn, from another source, that the Board had made detailed studies of precisely the kind of information requested. The CAB lied.

Similarly, data was requested on the CAB's backlog of consumer complaints. The Board took four weeks to respond to this single request for the most basic kind of information as to how well it is performing its duties. When that information was finally provided, we learned that the backlog—number of complaints on which the CAB has taken no action—has risen by over 600 percent over the last five years!

Frustrated by this inability to get the basic statistical information from the CAB, we requested an opportunity to inspect the complaints filed by citizens with the CAB against the airlines. This request under the Freedom of Information Act was arbitrarily denied on the astonishing theory—articulated and repeated by Charles Kiefer, Executive Director of the CAB—that if the public's complaints were made available for inspection, the airlines would find out the complainants' identities and retaliate against them. Finally, after weeks of delay, the Board agreed to permit inspection of a few complaints, *but only if the student agreed not to write down the names or sources of the complaints*. This meant, for practical purposes, that we could not correspond with citizens filing serious

complaints to see whether they were disposed of satisfactorily by the airlines or the CAB.

Late in the summer, we learned of a recent report by the CAB of the causes and handling of customer complaints received by the airlines industry. This important study, made at substantial public expense, demonstrated that citizen discontent with the airlines industry has hit a critical level, and cited specific airlines for their apparent complete lack of interest in the problems of inconvenienced air travellers.

Nevertheless, the CAB has suppressed this report from the public, which has every right to know which airlines are concerned with resolving legitimate complaints—and which ones are not. The report was denied to us on the specious reasoning that it "mentions names of airlines", gives numbers of complaints received by some of the airlines and was compiled from the records of the airlines regulated by the CAB. For these reasons, and because the CAB feared that the findings might be competitively detrimental to the deficient airlines, the CAB officials concluded—apparently without the benefit of legal advice from the CAB legal staff, it should be noted—that release of the survey to us, or even the names of the airlines considered to be deficient, was precluded by a statutory section prohibiting the Board from divulging certain classes of confidential financial and commercial data obtained in CAB audits of the airlines' books. This argument, however, utterly ignores the fact that much of the information requested had already been released to several of the airlines as well as to their trade association. The legitimacy of the CAB's rationale is further shattered by the fact that detailed information on the number and types of complaints is readily exchanged among the airlines themselves, which destroys the shibboleth of pretended confidentiality.

The fact of the matter is that the CAB officials have been regularly providing business management and public relations advice, at public expense, to private interests in the airline industry, and have been withholding critical information of the industry which is needed by the public. The dangers of governmental secrecy are manifest in this episode of patent disregard by an important regulatory agency for its responsibilities to the public. For while the CAB is busy providing services for special corporate interests, it has no time or resources for its basic mission of regulation. For example, during the summer numerous requests for basic statistical data which we requested were denied by the CAB on the grounds that it has inadequate staff and accordingly could not assemble such information or provide it for our study. Some of the records that CAB told us it does not bother to keep include the following statistics:

Speeches and personal appearances made by members of the CAB.

Records of the costs of investigations conducted by the CAB.

Travel allowances and budgetary allocations for individual Board members, the Executive Director and the Director of Community and Congressional Relations of the CAB.

Enforcement actions by the CAB's Bureau of Enforcement against air carriers for violations of the law.

Complaints charging racial discrimination by the airlines.

The number of initial decisions of CAB hearing examiners appealed to the Board in accordance with its regulations.

The number of interested parties seeking to intervene in CAB proceedings pursuant to its rules of practice.

We frankly find it beyond belief that an agency can effectively protect or advance the public interest without establishing for itself basic priorities and keeping certain basic records of its work. In the atmosphere of openness and public scrutiny contemplated in the freedom of information philosophy, we submit, such contempt for the rights and needs of citizens and such patronizing solicitude for the business interest and image of private industry cannot thrive.

THE FOI ACT AND THE MEDIA

FREEDOM OF INFORMATION CENTER REPORT No. 303

SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI AT COLUMBIA, MAY 1973

(This report was written by Carole Fader, an M.A. candidate in the School of Journalism)

The Freedom of Information Act of 1966 stands today as basis for the press' right of access to government information. Indeed, it has been said that one of

the primary purposes of the Act is to aid the press in obtaining information from the government. But has the press used this weapon to its advantage?

In a study conducted by Samuel J. Archibald, Washington director of the University of Missouri Freedom of Information Center, it was found that between July 4, 1967 (when the Act went into effect) and July 4, 1971, there were 254,637 requests for information. Many of these requests concerned small matters, yet only 90 of the requests were made by the media.¹ Peter G. Miller, Washington editor of Chilton Publications, noted (Editor & Publisher, 7-8-72) that in four years the media had used the formal provisions of the Act only 12 times—10 formal requests came from magazines, two from newspapers and none from the electronic media. (Archibald's 254,637 requests include all requests for information made to government agencies; Miller's referral to formal requests concerns only those requests to government agencies which followed the procedures outlined in the FoI Act.) Presently, three cases have been taken to court under the FoI Act by newsmen and one court suit was filed January 31, 1973.² Statistics, however, can be deceiving. While some criticize the press for not using the Act, the press itself states that it has used the Act effectively, as a coercive tool that helps to loosen information. Others of the press argue that the very nature of the FoI Act has prevented them from obtaining information. In view of the controversy, this report will look at the media's used of the FoI Act during the five and one-half years of its implementation.

CRITICISM: ARCHIBALD AND MOORHEAD

The 500-word FoI Act states that all government papers, opinion, records, policy statements and staff manuals are to be made available upon request unless they fall among one or more of nine exemptions. In addition, the requestor could take a government agency to court if it refused to give out information; the burden of proof for withholding information would be on the government in any court case.³

The law was hailed as a breakthrough in the freedom of information area. Use of the Act began almost immediately, with corporation or private law firms heading the list of requestors. The press, however, started out slowly. Concerning the press' non-use of Act, Samuel Archibald said (Editor & Publisher, 5-16-70) that "if newspapers wanted to mount a publicity campaign on certain governmental agencies' non-disclosure policies—if they would put some of their printer's ink where their mouth is—the FoI Act would work." When Archibald's 1972 study on the number of requests and disclosures revealed that, after four years, the press had made very little use of the Act, Rep. William S. Moorhead, (D-Pa.) chairman of the House Government Operations Subcommittee on Foreign Operations and Government Information, criticized (Kansas City Star, 3-3-72) the media:

I am surprised that the reporters, editors and broadcasters whose job it is to inform the American people have made so little use of the FoI Act. They were the major supporters of those in Congress who created the law. The free and responsible press is the keystone of an informed, democratic society and it should be the major user of the law designed to guarantee the people's right to know.

THE PRESS ANSWERS: ABUSE AND AMBIGUITY

In light of this criticism, five journalists testified (Washington Post, 3-18-72) before Moorhead's subcommittee that, despite the Act, too much information was being withheld. They inferred "why go to the trouble of using the Act when you know you aren't going to get the information anyway?" Such a defeatist attitude held by members of the press seems to have been borne out by various examples. It has been reported that, in cases involving news organizations and other requestors, government agencies often have used the nine exemptions of the Act as an umbrella under which they can hide from any shower of requests made to them.

The exemptions exclude (FoI Report No. 280) matters that are:

¹ Samuel J. Archibald, comp., "Analysis of the Use of the FOI Act from July 4, 1967 to July 4, 1971," (Unpublished table, Freedom of Information Center, 1972).

² Ron Plessner, Press Information Center, Washington, D.C., Telephone Call (February 21, 1973).

³ Freedom of Information Act, 80 Stat. 250 (1966).

- (1) Specifically required by executive order to be kept secret in the interest of national defense or foreign policy;
- (2) Related solely to internal personnel rules and practices of any agency;
- (3) Specifically exempted from disclosure by statute;
- (4) Trade secrets and commercial or financial information obtained from any person and privileged or confidential;
- (5) Inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency;
- (6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) Investigatory files compiled for law enforcement purposes except to the extent available by law to a private party;
- (8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; and
- (9) Geological and geophysical information and data (including maps) concerning wells.

The government sees these nine exemptions as necessary in order to protect national security and to protect others in cases where the release of information might be detrimental to the public interest. The press sees some of the government's uses of the exemptions simply as attempts to withhold information that the government does not want disclosed or else might prove embarrassing if revealed.

The Daily Oklahoman (Oklahoma City, Okla.), on May 12, 1972, appealed under the FoI Act for the release of information concerning the 1968 Mylai incident. The Army decided to release certain records on Mylai, but denied the second part of the Oklahoman appeal for release of the Army's four-month, 32-volume investigation into Mylai called the Peers Report (after Lt. Gen. William R. Peers). The Army said (New York Times, 6-21-72) it was withholding the Peers Report on the grounds that it is an interoffice memorandum (the fifth exemption), an investigation report compiled for law enforcement purposes (the seventh exemption), and that disclosure would be an invasion of personal privacy (the sixth exemption) and would jeopardize a fair and impartial disposition of the appeal of First Lt. William Calley. (There is a question as to the legitimacy of this last argument because, when setting up the Peers panel, Army Secretary Stanley R. Resor said, "the scope of your investigation does not include, nor will it interfere with, ongoing criminal investigations.")

When the Mylai cases were concluded, the Army changed its grounds for denial and argued that the report could not be released because it would be "prejudicial to national security," a point which had never before been raised. The American Society of Newspaper Editors (ASNE) wrote a letter to Defense Secretary Melvin R. Laird contending that the action "was not only contrary to the FoI Act, but is contrary to the best interests of the American people, the Army and the United States." The information released to the Oklahoman, it was also contended, had opened up "errors and discrepancies between official Army records and prior investigations, leading inescapably to a number of fundamental questions about the Peers Report." The letter failed to produce the report, and separate appeals to Herbert G. Klein, President Nixon's communications director, were made by John R. Finnegan, freedom of information chairman of the Associated Press Managing Editors Association (APMEA) and Dick Fogel, chairman of Sigma Delta Chi's freedom of information committee. Meanwhile, Rep. Les Aspin of Wisconsin filed suit to force release of the Peers Report under the FoI Act, but lost in early 1972 in the federal district court for the District of Columbia. In June, 1972, Army Secretary Robert F. Froehke said that he would wait until the Calley case was reviewed by the President before he would consider the question of releasing the report.⁴

The press also sees the vague wording of the Act as posing similar problems in interpretation. The Pentagon refused (Louisville Courier-Journal, 9-23-72) to make public an unclassified survey of 1,400 radio and television stations conducted for the Army by the Gallup organization. The Pentagon said (Louisville Courier-Journal, 9-13-72) its refusal was based on the clause in the FoI Act that gives

⁴ Grant Dillman, "The Peers Report," Report of the 1972 Sigma Delta Chi Advancement of Freedom of Information Committee, (Fall, '72), p. 10.

the government power to withhold "reports of inspection, audits, investigations or surveys which pertain to the safety, security or internal management, administration or operation of the Department of Defense." Although the poll is unclassified, disclosure would be embarrassing to the Army because it shows that a majority of the nation's broadcasters are not willing to give free prime-time advertising to the Army's recruitment campaign. The poll also led (FoI Digest, Sept.-Oct. '72) to a charge by a CBS network official that the poll was part of an effort to force stations to carry Army advertisements without charge. The information is still being withheld.

Other reported cases where the nine exemptions and the ambiguous language of the Act became major drawbacks to the press' acquiring of information included (FoI Digest, Mar.-Apr. '72) the withholding of the details of a Pentagon "slush" fund generated from rents and commissions paid by private businessmen in the Pentagon mall (Roy McGhee, UPI Washington correspondent) and the withholding of an FCC-maintained "blacklist" on 10,000 individuals, used as a guide in considering license requests (R. Peter Straus, president, Straus Communications Inc.).

THE PRESS ANSWERS: COURTS ARE TIMID

What Sen. Frank E. Moss (D-Utah) called the "timidity of the courts" could (Congressional Quarterly, 2-26-72) also play an important part in souring newsmen from using the Act. Archibald noted (FoI Report No. 280), that (in all cases tested by the courts) in the area of national defense and foreign policy, the courts have refused to second guess the executive branch and decide whether secrecy is necessary. The case of the Pentagon Papers provides an example: Benny L. Kass, a Washington lawyer, argued Sen. Moss' suit for the release of the papers under the FoI Act in the summer of 1971. The Pentagon defended its refusal to release the documents because they fell under the national security exemption, and won the case. Citing the inefficiencies of the courts concerning this exemption, Kass said (Congressional Quarterly, 2-26-72):

The Act specifically provides for a court review of all data claimed to be exempt under the national security clause, but the court in the Moss case and other courts are not looking at the material. They prefer to reach their decision on the basis of whether the exemption was claimed arbitrarily or capriciously, sometimes difficult to determine without looking at the material requested.

And, concerning the Pentagon Papers case itself, Herbert Mitgang, columnist for the New York Times, noted (12-18-72) that "the attempt by the administration to block the publication of the papers took place despite the FoI Act. Such governmental activities defy the intent of the Act and serve as warnings to journalists."

Thus, the criticism by Rep. Moorhead, among others, has been answered by the press by pointing out cases in which the broad applicability of the language and the exemptions have been used to stifle freedom of information. There is, however, another answer posed by governmental agencies themselves—that the FoI Act has sufficiently opened up government files so that actual use of the Act is unnecessary.

DISCLOSURE POLICIES SUFFICIENT?

There is some truth to this reasoning: many government agencies are complying with the terms and spirit of the Act in opening up their files for public use. In a study conducted by John Finnegan, executive editor of the St. Paul (Minn.) Dispatch and the Pioneer Press, involving 123 members of the AMPEA, 59.4 per cent of the newspapers surveyed indicated (Editor & Publisher, 6-26-71) they had no trouble in getting information out of federal agencies in their local communities. An early case of a news organization obtaining information easily involved (FoI Digest, Nov.-Dec. '67) Science magazine. The editors requested and obtained from the National Science Foundation (NSF) information relating to its refusal to renew a research grant to Stephen Smale, an admitted left-wing mathematician from Berkeley. (Subsequently, the magazine reported (11-3-67) that nothing in the documents could be found to substantiate the NSF allegations of impropriety or substandard performance on Smale's part.)

There have been similar successes in obtaining information without using the FoI Act. However, it has also been pointed out that many of the requests made by 59.4 per cent of the newspapers in Finnegan's study and that many of the 254,637 requests documented in Archibald's study concerned trivial matters; the highest

refusal rates came from major government agencies. Indeed, Finnegan's study noted that 50 newspapers said they had encountered problems in receiving information; 21 cited the Justice Department, particularly the FBI, as being the most difficult to deal with. Eight editors felt that federal judges have been too restrictive on coverage in courts and buildings. The Department of Health, Education and Welfare, the Treasury Department, the Social Security Administration and the Commerce Department were also cited as sources of major problems. Gaylord Shaw of the Associated Press related an experience of trying to get information from a government agency:

We finally got the information we wanted, but a recent Special Assignment Team project on ship subsidies was stalled for many weeks because the Maritime Administration balked at making financial data available. The Administration put us off by saying they didn't keep files by vessels and it would take many man-hours to compile it. Our offer to compile data from the files was rejected—they didn't want to open up files wholesale. The Administration finally decided we could have the information if we paid a fee of several hundred dollars. But we went to an assistant secretary in the Department of Commerce which oversees the Maritime Administration. He wrote to the agency directing it to compile the information for him, then he made it available to us. The whole process took 98 days—to get data for one story.⁵

So, while the press admitted that, in some instances, it was not difficult to obtain information, other newsmen still argued that, in other cases, it was almost like pulling teeth.

Shaw's AP case leads to another reason, one of the most important, why the press has not been using the FoI Act widely. Some critics say the press is guaranteed recourse to a stubborn agency's refusal to disclose information by the terms of the FoI Act which provide for court action. The press answers this argument with one of its own—that of time and money, both of which most news organizations can spare little.

DEADLINES DICTATE

A newspaper, for example, does not have the time to hold a story while it pursues government information. (Conceivably, corporations and private law firms, the major users of the Act, do not have to face the time barrier so they can use the Act more effectively.) Under the terms of the Act, a requestor has 20 days after an initial request is denied to appeal that decision. The government, on the other hand, has 60 days to answer. The response to an initial request itself may take months. Alan L. Otten, a columnist for the Wall Street Journal, said (10-5-72) that major agencies took on the average 33 days to respond and, when acting on an appeal from a denial decision, averaged 50 additional days. Ralph Nader, in a study conducted by his atsk force (press release, 8-26-69), found delays in finally receiving information of "sometimes up to 16 months." Taking a case to court would involve more precious time. Various newsmen indicate that not having a specific time schedule set out in the Act prevents newsmen from making extensive uses of it.

Bob Barr, a Washington reporter for Women's Wear Daily, thinks (Editor & Publisher, 5-16-70) Congress should abolish the law: "The very mechanics of the thing defeats anybody who needs information on a timely basis. You can't legislate openness in government . . . newsgathering requires trust more than law." Les Whitten, who works for Jack Anderson's Washington column, says, "The basic problem with the law is you just don't have the time to get the machinery of the law in operation." John Seighenthaler, of the Nashville Tennessean, elaborates (Quill, 8-72):

One of the problems is really reaching a point of conflict. I think that within government, particularly, the information officer, does not know about it (the Act) and he is anxious to avoid conflict if he possibly can and so, quite often, reporters get waltzed around for a day, week or month or, inevitably, never get the information. . . . They are never able to make a case with the city editor or with the editor, much less with the legal counsel of the newspaper, that they are really getting a run-around.

In John Finnegan's study, many editors reported (Editor & Publisher, 6-26-71) the greatest problem was getting the run-around from some local agency repre-

⁵ John Finnegan, letter to the Freedom of Information Center (July 7, 1971).

sentatives. "We are not authorized to release that information," or "You'll have to check with Washington," were common devices used to put off requests at the local level, according to the editors.

Ward Sinclair, of the Washington bureau of the Louisville Courier-Journal, cites (Quill, 8-72) disadvantages of reporters who represent newspapers hundreds of miles away from Washington:

Our contacts with the home office sometimes are infrequent. When the question of unavailability of information arises in a reporter-federal agency confrontation, it is most often the reporter himself who must make the instant judgment about pursuing his request. . . . Most of us, not being lawyers, do not get very far. . . .

The Washington bureau newsman often flits from one subject to another. Today he is at the Senate, tomorrow at the House, next week at the Interior Department and so on. Events do not wait for him. If he is stalled or deterred in his efforts to collect information on one subject, there is always a fresh, new—and perhaps more easily covered—subject awaiting him, sometimes forced upon him by the pressure of time and events. Thus, the government official who delays, fails to respond promptly, or passes the buck, plays a far more stronger hand than the reporter who, perforce, must move on to other things.

USE OF THE ACT AS A LEVER

It must be recognized that there have been many successes by reporters who threaten to use the FoI Act in court to get the information they desire. This is one reason why the press believes that it has been unduly criticized for not using the Act. John Seigenthaler has said, "There are a number of working reporters who are using the act as a sort of lever to break information loose, and you never really hear about the many cases in which that occurs." While this "implicit" use of the FoI Act is an important consideration due the press, other newsmen argue that the time element involved is still measurable. The following cases are those in which the press has been mostly successful in getting information by using the Act as a means of coercion. However, while heeding these successes, one must also pay attention to the time factor involved.

The Arizona Republic made an initial request for information in January 1970, to obtain a release from the Department of Labor report criticizing the Concentrated Employment Program (CEP), a job training program in Phoenix. The refusal statement said that making such criticisms public "would mean an end to further explanation." The refusal was issued three months after the initial request. The reporter for the Republic involved in the story threatened to use the FoI Act in court if she did not get the information. After five more months of haggling, the paper received the information with a note from the Labor Department stating that the department thought the reporter wanted Volumes III and IV which had not yet been completed, instead of Volume II (the reporter had made the request specific in her initial request).⁶

Trudy Lieberman, a reporter for the Detroit (Mich.) Free Press, got wind of a list of recommended American wines that the Department of State distributed to foreign service officers working overseas (Consumer's Union Newsletter, 2-26-70). The list was compiled by domestic wine experts and named brands. Anticipating possible State Department resistance to the release of that list, Miss Lieberman got her paper to commit itself to a possible test case under the FoI Act if she had no luck. The court action was not necessary—under threat of the use of the Act, the State Department gave her the list.

The Detroit Free Press also received a previously secret federal study showing the fat content of hot dogs after using the FoI Act to pry the information loose.⁷

In 1969, the Arizona Republic obtained (Arizona Journalist, Spring '70), previously undisclosed information concerning administrative costs of the federal Medicare program in Arizona. The reporters had been trying to get the information from the government for a long time. They finally appealed to the Region I Social Security Administration representative, enclosing a reminder of the FoI Act's provisions. The figures arrived four days later, but six months after the initial request.

Another time barrier case involved the New York Times, which came close to suing under the Act against the government Renegotiation Board (which oversees

⁶ Connie Cobb, letter to the Freedom of Information Center (August 11, 1972).

⁷ Detroit Free Press, letter to the Freedom of Information Center (September 10, 1970).

cost overruns by government contractors). The Times requested (Editor & Publisher, 5-16-70) a list of contractors who had overrun their estimates and a list of the settlements. At the same time, Grumman Aircraft Engineering sued the board and the Times decided to wait for the outcome of that case. Over a year elapsed from the time the board refused the information. During that time, Bob Phelps, the Times Washington bureau editor, went to the Attorney General's office, to Sen. Edward Kennedy's (D.-Mass.) Senate Committee on Government Information, to Moss' House committee, to the General Accounting Office and, finally, to Herbert Klein in efforts to get the information. Klein neglected to return telephone calls and letters from the Times for several months. When the paper threatened to use the FoI Act, Klein finally responded that the information could not be disclosed because of the FoI Act's financial data exemption. Grumman's case finally came to court, and the information was (FoI Report No. 280), released with "identifying details stricken," almost two years after the initial request.

Samuel Archibald, one of the early critics of the press' seemingly low rate of usage, noted (Louisville Courier-Journal, 3-19-72) that, "important, however, is the threat of court action, for a government official who must prove in court that secrecy is necessary will think twice before refusing demands for access." Recognizing this, Archibald has been active in this regard; by citing the provisions of the FoI Act, he helped the Tombstone (Ariz.) Epitaph obtain appraisal reports from the Forest Service, among his other efforts. John Finnegan, again by using the FoI Act as a threat, helped columnist Carl Brown obtain FBI minority employment records.⁸

Although more and more successful instances of "use by threat" are being recorded, sometimes even threatening does not help. Finnegan's study reported (Editor & Publisher, 6-26-71) that the St. Paul Dispatch was not able to get information on small grain program abuses from the General Accounting Office (GAO) despite a threat to use the Act. The GAO said it was an agency of Congress and not covered by the FoI law.

A COST CONSIDERATION

Besides the time delay factor, the press also notes a cost factor which has plagued other requestors as well. Some government agencies charge exorbitant prices as copy and search fees.

Pete Neumann, a reporter for the Colorado Springs (Colo.) Free Press, tried in 1970 to get gasoline octane reports from the Federal Trade Commission under the terms of the FoI Act (Consumer's Union Newsletter, 2-26-70). He was told that he would have to pay 75c a page or a "mere" \$312.00. When Neumann protested, he was told he could have a look at the reports, "if he'd care to come to Washington."

The Ellwood City (Pa.) Daily Ledger requested (FoI Digest, July-Aug. '71) names of 657 Lawrence County farm subsidy recipients. After five months, the paper had received only five names. The local Agricultural Stabilization and Conservation Service (ASCS) advised the Ledger that to get the remaining names, it would have to pay 18c per name (\$117.36) plus \$4.00 per hour for the time to compile the list. In addition, the paper would have to give "valid" reasons for wanting the information. Action was taken by the Ledger publisher, the Pennsylvania Newspaper Publishers Association and the National Newspaper Association and, eventually, the list was obtained free of charge, but after a seven-month delay.

Taking a case through the courts, the press argues, would involve more money, as well as time.

OTHER GOVERNMENT TACTICS

Time delay and cost have been the major reasons why newsmen have not been using the FoI Act in many cases. However, various news organizations have reported other tactics used by the government to avoid disclosure:

—The "Trade"—government officials will often trade official information to reporters for silence on certain other subjects.

—Favor—government agencies will often favor industry and trade publications reporters over others.⁹ Also, information refused the media is (Congressional Quarterly, 2-26-72) often available to lobbyists through agency contacts.

⁸ "Use of the FoI Act in 1970 and 1971 (Significant Cases)," (Unpublished list in the Freedom of Information Center, 1971).

⁹ Ralph Nader, Study of Responsive Law, "Effectiveness of the FoI Act," Press Release (August 26, 1969).

—Informal Negotiation—if a graceful way can be found to release information, a public information officer will try (Editor & Publisher, 7-8-72) to obtain at least part of the material a correspondent is seeking so as not to antagonize the press. Rather than reading about something in the newspapers, the official would rather release it officially. This leads to the consideration that when information is released (Straus' Editor's Report, 7-19-71) officially, it goes to the public (often in special announcements that alert other news organizations) and not just the party who made the request.

Congressional Quarterly reported (7-8-72) other tactics used by the government in the case of any requestor, including newsmen:

—Contamination—unclassified information is mixed in with unclassified information so a whole file becomes classified.

—Trade Secrets—correspondence between a government agency and a manufacturer is kept secret by claiming it contains formulas or other trade secrets which would benefit a competitor.

—Specificity—A requestor is required to be specific about what information is needed; obviously, when material has been kept from the public, this requirement is difficult to satisfy.

—Investigation Files—files on investigations of law violations are opened, then the pertinent data is concealed.

—Working Paper—a requestor is told the data he is seeking must be withheld because it is incomplete or in preliminary form.

—Uneven Application—agencies are not consistent in their application of the law; some give information freely, others do not.

—Uninformed Personnel—information officers are often kept in the dark so they are not able to help a requestor. Also, Harrison Wellford, of Ralph Nader's Study of Responsive Law, has noted (Congressional Quarterly, 2-26-72), "a bureaucrat's first question is, 'Why do you want this information,' which is not his business under the Act."

Ralph Nader's group (press release, 8-26-29) found two more tactics:

—Obscurity—information is buried in obscure files so it is not readily found or available to requestor.

—Privacy—studies are kept private so that no one knows that they are being conducted.

One example of all this government bureaucratic abuse is a case involving columnist Carl Rowan. In the Kansas City Star Rowan told (1-17-68), of his successful attempts to obtain telegrams sent by the State Department to South Vietnam to get high-level appointments for traveling Congressmen and politicians. Rowan said his initial efforts were frustrated by personnel in the department's Bureau of Congressional Relations who claimed variously that the telegrams were "spread too thin" in office files or that the bureau was "too understaffed" to meet the request. Rowan said he then contacted Dixon Donnelly, Assistant Secretary of State for Public Affairs, who promised to produce the telegrams if Rowan would name specific Congressmen involved. When no results from these efforts were forthcoming, Rowan said he was finally put in touch with a State Department lawyer who took the position that the telegrams were "internal communications" and, thus, exempt from public disclosure under the FoI Act.

CASES IN THE COURTS

While the press argues that it has used the Act as a tool to pry information loose and that governmental tactics, such as time delay and cost, have prevented newsmen from using the Act, it can be shown that the FoI Act has been successfully, though sparingly, used in the courts for those news organizations that decide to go that route.

Again, using the FoI Act under threat has helped some newsmen even before the case actually came to court. On June 25, 1970, Harold Weisberg, a writer and researcher, forced the Justice Department to reverse its position and make available the records of James Earl Ray's 1968 extradition from England in the slaying of Dr. Martin Luther King. The Justice Department claimed the records were exempt from disclosure because of the "investigative files" exemption (the seventh exemption) of the FoI Act. Weisberg filed a civil suit under the Act asking for a court order compelling the Justice Department to allow him access to the records. Attorney General John Mitchell granted access while the court action was still pending.¹⁰

¹⁰ "Use of the FoI Act . . .," op. cit.

The Seattle (Wash.) Times (3-5-71) filed suit under the FoI Act in federal district court in Washington against the director of the Seattle Model Cities Program. The paper requested copies of contracts between the Model City Program and the United States Inner City Development Foundation. The director of the program subsequently agreed to make available the records sought and the Times withdrew its complaint.

Thus far (and here, again, it is argued by newsmen that critics look at just the court cases and not the press' use of the FoI Act as a coercive tool) there have been three cases taken through the courts by newsmen. They have all been successful for the press, and it is hoped by many that more news organizations will take further initiative.

Philadelphia Newspapers, Inc. v. Department of Housing and Urban Development. The Philadelphia Inquirer filed suit under the FoI Act to compel the Secretary of the Department of Housing and Urban Development (HUD) and other federal officials to provide the paper with names of certain appraisers who had allegedly appraised dilapidated homes far in excess of their value. On the plaintiff's motion for summary judgment, Judge John W. Lord, Jr., of the district court, held that names and addresses of fee appraisers who had evaluated certain properties for the Federal Housing Authority (FHA) insurance, which were included in file binders before a grand jury, were not immune from disclosure under the FoI Act as part of "intraagency memoranda," nor as part of "investigatory files." The court said that "the investigation is into a program which may have victimized home buyers in the Philadelphia area and thwarted objectives of the government program involving enormous amounts of public funds. Surely, the public has a right to know."¹¹

Tennessean Newspapers, Inc. v. Federal Housing Authority. A blind man bought a house in Nashville under a financing scheme which involved Federal Housing Authority (FHA) mortgage insurance. The FHA appraised the house at a value of \$10,850. Subsequently, the homeowner discovered that there were various defects in the house which made such an appraisal dubious. An independent appraiser, hired by the man, appraised the value of the house much lower than did the FHA appraiser. The homeowner tried to get a copy of the original appraisal, but the FHA refused to release it. The Nashville Tennessean ran a series of articles which criticized the FHA and various other officials for their handling of the case. Ultimately, the FHA gave the homeowner an illegible copy of the appraisal. This prompted the Tennessean to sue under the FoI Act, whereupon the FHA made legible copies available, but with the name of the appraiser deleted. The district court entered an order requiring the FHA to make the appraisal available under the terms of the Act, but also held that the association did not need to make the name of the appraiser available. The newspaper appealed the order and won the case in the sixth court of appeals. The appellate court reversed the lower court's decision and said that there was no basis for the FHA to refuse access to the report, or for the FHA or the district court to arbitrarily remove the appraiser's name.¹²

Schechter v. Richardson. The third court case involved Mal Schechter, senior editor of Hospital Practices, a monthly publication for physicians. Schechter sued under the FoI Act for access to Medicare inspection records on nursing homes and other facilities. He contended that the 1939 social security law was never intended to be applied to inspection documents which began being prepared 25 years later, after Medicare was enacted. The Social Security Administration (SSA) maintained that the 1939 law authorized secrecy authority as did the FoI Act. Judge Joseph C. Waddy, of the district court in Washington, decided that the nursing home inspection records were not specifically exempted from disclosure by the 1939 law. He ordered the Department of Health, Education and Welfare (HEW) to produce the reports Schechter sought. The data was made (National Observer, 11-25-72) available, but only those 15 reports that were requested in the suit. Meanwhile, government attorneys obtained a temporary stay to consider appealing, but Ron Plessner, Schechter's attorney, reported (FoI Digest, Sept.-Oct. 1972) that the Attorney General's office of appellate division dropped the case, giving Schechter access to all the records.

A Current Case. One case, recently filed by Ron Plessner of the Press Information Center (Washington, D.C.), marks the entry of the electronic media into

¹¹ *Philadelphia Newspapers, Inc. v. Department of Housing and Urban Development*, 343 F. Supp. 1176 (E.D. Pa. 1972).

¹² *Tennessean Newspapers, Inc. v. Federal Housing Authority*, 464 F. 2d 657 (6th Cir. 1972).

the FoI Act court spotlight. *Stern v. Kleindienst* involves Carl Stern, an NBC reporter, who is seeking the release of information about "Counterintelligence Program—New Left." Stern has been trying to get this information from the FBI and the Justice Department since he reportedly saw (Kansas City Star, 2-2-72) a Justice Department document instructing FBI agents to mail anonymous letters urging colleges "to take decisive action against the New Left." In filing the suit, Plessner said (FoI Digest, Jan.-Feb. '73), "The Press Information Center aims to help the working press make use of the right of access guaranteed to them. The eminence of court suits should help to avoid delay and to increase government cooperation with the press."

OTHER CRITICISM

Although these cases look promising for the media, it still requires much time and expense to go to court. Robert O. Blanchard suggested (Quill, 8-70) that editors and publishers are reluctant to go to the trouble and expense of going to court. He also stated that the media are not often willing to invest the manpower to follow up requests. John R. Reynolds said (Editor & Publisher, 5-16-70) that "resources available to metropolitan dailies and their self-pride have made them reluctant to sue the government." Furthermore, other reporters, while agreeing with these early opinions, maintain that Washington reporters do not want to incur the wrath of the Administration for fear of losing an all-important story or interview. And Rep. Moorhead added (Va. Publisher and Printer, 6-72) that, "reporters don't want to admit they can't get information from their sources or they have a fear of pushing their sources too hard causing them to dry up."

SOLUTIONS

With all these problems in mind, it seems that a solution which will satisfy both the media and its critics is necessary. Headway is being made in this regard. In order to better acquaint newsmen with the FoI Act, the Freedom of Information Center and the Press Information Center, among other organizations, have been releasing guides to the FoI Act which explain proper methods of requesting information and which explain ways by which a reporter can avoid delay and work around the nine exemptions. News organizations have come up with their own solutions which they have been printing in their publications. But the best solution seems to be changing the current law. The Moorhead subcommittee has been holding hearings concerning the FoI Act. In light of the testimony given by journalists and others, the subcommittee contends that the only answer is to amend the law. According to a press release from Moorhead, dated for release March 9, 1973, he planned to reintroduce proposed amendments to the FoI Act early in May, 1973. Among the reforms, which are designed to strengthen the operation of the Act, those which will be most beneficial to newsmen include the following:

- Agencies would be required to "publish and distribute" their opinions made in the adjudication of cases, policy statements and interpretations adopted, and administrative staff manuals and instructions to staff that affect the public, rather than merely making them "available for public inspection and copying" as provided in present law.

- Agencies would be required to respond to requests for records which "reasonably describe such records."

- Agencies would be required to respond to requests within 10 days, excepting Saturdays, Sundays and legal holidays, after receipt of a request and within 20 days (the same exceptions) on administrative appeals following denials to the requesting parties.

- The government would be required by the courts to pay "reasonable attorney fees and other litigation costs" of citizens who successfully litigate cases.

- Agencies would be required to file answers and other responsive motions to citizens' suits within 20 days after receipt.

- Permissive exemptions would be amend to modify and limit their applicability.¹³

SUMMARY AND CONCLUSIONS

The use of the FoI Act by newsmen has come under scrutiny by critics who claim that the press helped fight for the Act, yet are not using it. The press, on the other hand, maintains that ambiguous language of the Act, the too-widely

¹³ Press Release from Rep. William S. Moorhead, dated for release, March 9, 1973.

abused nine exemptions, the time delay and cost factors, among other government tactics, have made the Act difficult to use. The press also argues that newsmen have used the Act as a threat to force out information. Having looked at all the arguments, the best answer seems to be further legislation. Until some reforms are adopted, however, it must be remembered that the FoI Act is still an important tool for the press. The Act stands today as a guarantee for the media and the public that they have a right to obtain information which they have a need, and a right, to know.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDATION NO. 24—PRINCIPLES AND GUIDELINES FOR IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act, 5 U.S.C. § 552, expresses important policies with respect to the availability to the public of records of Federal agencies. To achieve free access to and prompt production of identifiable government records in accordance with the terms and policies of the Act each agency⁴ should conform to the statutory policy encouraging disclosure, adopt procedural regulations for the expeditious handling of information requests and review the fees charged for providing information.

RECOMMENDATION

A. General Principles

Agencies should conform to the following principles in handling requests for information:

1. Each agency should resolve questions under the Freedom of Information Act with a view to providing the utmost information. The exemptions authorizing non-disclosure should be interpreted restrictively.

2. Each agency should make certain that its rules provide the fullest assistance to inquirers, including information relating to where requests may be filed. It should provide the most timely possible action on requests for information.

3. When requested information is partially exempt from disclosure the agency should, to the fullest extent possible, supply that portion of the information which is not exempt.

4. If it is necessary for an agency to deny a request, the denial should be promptly made and the agency should specify the reason for the denial. Procedures for review of denials within the agency should be specified and any such review should be promptly made.

5. Fees for the provision of information should be held to the minimum consistent with the reimbursement of the cost of providing the information. Provision should be made for waiver of fees when this is in the public interest.

B. Guidelines for Handling of Information Request

Each agency should adopt procedural rules to effectuate the principles stated in Part A. To assist in this task the following guidelines are set forth as a model of the kinds of procedures that are appropriate and would accomplish this purpose.

1. *Agency assistance in making request for records.*

Each agency should publish a directory designating names or titles and addresses of the particular officers and employees in its Washington office and in its various regional and field offices to whom requests for information and records should be sent. Appropriate means should be used to make the directory available to members of the public who would be interested in requesting information or records.

Each agency should direct one or more members of its staff to take primary responsibility for assisting the public in framing requests for identifiable records containing the information that they seek. The names or titles and addresses of these staff members should be included in the public directory referred to above.

⁴ The term agency as used herein denotes an agency, executive department, or a separate administration or bureau within a department which has adopted its own administrative structure for handling requests for records.

2. *Form of request.*

a. *No standard form.*

No agency should require the use of standard forms for making requests. Any written request that identifies a record sufficiently for the purpose of finding it should be acceptable. A standard form may be offered as an optional aid.

b. *Categorical requests.*

i. Requests calling for all records falling within a reasonably specific category should be regarded as conforming to the statutory requirement of "identifiable records" if the agency would be reasonably able to determine which particular records come within the request and to search for and collect them without unduly burdening or interfering with agency operations because of the staff time consumed or the resulting disruption of files.

ii. If any agency responds to a categorical request by stating that compliance would unduly burden or interfere with its operations, it should do so in writing, specifying the reasons why and the extent to which compliance would burden or interfere with agency operations. In the case of such a response the agency should extend to the requester an opportunity to confer with it in an attempt to reduce the request to manageable proportions by reformulation and by outlining an orderly procedure for the production of documents.

3. *Partial disclosure of exempt records and files.*

Where a requested file or record contains exempt information that the agency wishes to maintain confidential, it should offer to make available the file or a copy of the record with appropriate deletions if this can be done without revealing the exempt information.

4. *Time for reply to request.*

Every agency should either comply with or deny a request for records within ten working days of its receipt unless additional time is required for one of the following reasons:

a. The requested records are stored in whole or part at other locations than the office having charge of the records requested.

b. The request requires the collection of a substantial number of specified records.

c. The request is couched in categorical terms and requires an extensive search for the records responsive to it.

d. The requested records have not been located in the course of a routine search and additional efforts are being made to locate them.

e. The requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are: a) exempt from disclosure under the Freedom of Information Act and b) should be withheld as a matter of sound policy, or revealed only with appropriate deletions.

When additional time is required for one of the above reasons, the agency should acknowledge the request in writing within the ten-day period and should include a brief notation of the reason for the delay and an indication of the date on which the records would be made available or a denial would be forthcoming.

The ten-day time period specified above should begin to run on the day that the request is received at that office of the agency having charge of the records. When a request is received at an office not having charge of the records, it should promptly forward the request to the proper office and notify the requester of the action taken.

If an agency does not reply to or acknowledge a request within the ten-day period, the requester may petition the officer handling appeals from denials of records for appropriate action on the request. If an agency does not act on a request within an extended deadline adopted for one of the reasons set forth above, the requester may petition the officer handling appeals from denials of records for action on the request without additional delay. If an agency adopts an unreasonably long extended deadline for one of the reasons set forth above, the requester may petition the officer handling appeals from denials of records for action on the request within a reasonable period of time from acknowledgement.

An extended deadline adopted for one of the reasons set forth above would be considered reasonable in all cases if it does not exceed ten additional working days. An agency may adopt an extended deadline in excess of the ten additional

working days (i.e. a deadline in excess of twenty working days from the time of initial receipt of the request) where special circumstances would reasonably warrant the more extended deadline and they are stated in the written notice of the extension.

5. *Initial denials of requests.*

a. *Form of denial.*

A reply denying a written request for a record should be in writing and should include:

i. A reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld.

ii. An outline of the appeal procedure within the agency and of the ultimate availability of judicial review in either the district in which the requester resides or has a principal place of business, or in which the agency records are situated.

If the requester indicates to the agency that he wishes to have a brief written statement of the reasons why the exempt record is being withheld as a matter of discretion where neither a statute nor an executive order requires denial, he will be given such a statement.

b. *Collection of denials.*

A copy of all denial letters and all written statements explaining why exempt records have been withheld should be collected in a single central-office file.

c. *Denials; protection of privacy.*

Where the identity of a requester, or other identifying details related to a request, would constitute an unwarranted invasion of personal privacy if made generally available, as in the case of a request to examine one's own medical files, the agency should delete identifying details from copies of the request and written responses to it that are made available to requesting members of the public.

6. *Intra-agency appeals.*

a. *Designation of officer for appeals.*

Each agency should publicly designate an officer to whom a requester can take an appeal from a denial of records.

b. *Time for action on appeals.*

There should be only one level of intra-agency appeal. Final action should be taken within twenty working days from the time of filing the appeal. Where novel and very complicated questions have been raised, the agency may extend the time for final action for a reasonable period beyond twenty working days upon notifying the requester of the reasons for the extended deadline and the date on which a final response will be forthcoming.

c. *Action on appeals.*

The grant or denial of an appeal should be in writing and set forth the exemption relied on, how it applies to the record withheld, and the reasons for asserting it. Copies of both grants and denials on appeal should be collected in one file open to the public and should be indexed according to the exemptions asserted and, to the extent feasible, according to the type of records requested.

d. *Necessity for prompt action on petitions complaining of delay.*

Where a petition to an appeals officer complaining of an agency's failure to respond to a request or to meet an extended deadline for responding to a request does not elicit an appropriate response within ten days, the requester may treat his request as denied and file an appeal. Where a petition to an appeals officer complaining of the agency's imposition of an unreasonably long deadline to consider assertion of an exemption does not bring about a properly revised deadline, the requester may treat his request as denied after a reasonable period of time has elapsed from his initial request and he may then file an appeal.

C. *Fees for the Provision of Information*

Each agency should establish a fair and equitable fee schedule relating to the provision of information. To assist the agencies in this endeavor, a committee composed of representatives from the Office of Management and Budget, the Department of Justice and the General Services Administration, should establish uniform criteria for determining a fair and equitable fee schedule relating to requests for records that would take into account, pursuant to 31 U.S.C. § 483a (1964), the costs incurred by the agency, the value received by the requester and the public interest in making the information freely and generally available. The Committee should also review agency fees to determine if they comply with the enunciated criteria. These criteria might include the following:

1. *Fees for copying documents.* In view of the public interest in making government information freely available, the fee charged for reproducing documents in written, typewritten, printed or other form that permits copying by duplicating processes, should be uniform and not exceed the going commercial rate, even where such a charge would not cover all costs incurred by particular agencies.

2. *No fee for routine search.* In view of the public interest in making government held information freely available, no charge should be made for the search time and other incidental costs involved in the routine handling of a request for a specific document.

3. *No fee for screening out exempt records.* As a rule, no charge should be made for the time involved in examining and evaluating records for the purpose of determining whether they are exempt from disclosure under the Freedom of Information Act and should be withheld as a matter of sound policy. Where a broad request requires qualified agency personnel to devote a substantial amount of time to screening out exempt records and considering whether they should be made available, the agency in its discretion may include in its fee a charge for the time so consumed. An important factor in exercising this discretion and determining the fee should be whether the intended use of the requested records will be of general public interest and benefit or whether it will be of primary value to the requester.

JUSTICE DEPARTMENT ORDER AND MEMORANDUM OF JULY 11, 1973,
SETTING POLICY AND PROCEDURES FOR INTERDEPARTMENTAL
COORDINATION OF FREEDOM OF INFORMATION ACT CASES

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

PART 50—STATEMENT OF POLICY

ORDER No. 530-73

POLICIES WITH REGARD TO THE DEFENSE OF CIVIL ACTIONS UNDER THE FREEDOM OF
INFORMATION ACT AND THE FUNCTIONS OF THE FREEDOM OF INFORMATION COMMITTEE

Under and by virtue of the authority vested in me by Section 509 of Title 28 of the United States Code, Part 50 of Title 28 of the Code of Federal Regulations is amended by adding at the end thereof the following new section:

*§ 50.9 Policies with regard to the defense of civil actions under the
Freedom of Information Act and the functions of the Freedom of In-
formation Committee*

(a) No civil action against a federal agency under the Freedom of Information Act, 5 U.S.C. 552, shall be defended by the Civil Division, the Tax Division or any other part of the Department of Justice unless the Department's Freedom of Information Committee has been consulted by the agency. This does not preclude the defense of a premature suit, brought before the agency's final denial of the materials at issue, provided that the agency as promptly as possible upon the filing of the suit brings the matter before the Committee.

(b) The Freedom of Information Committee referred to in this section is the committee of lawyers in the Office of Legal Counsel and in the Civil Division which was first established December 8, 1969. The functions and current membership of the Committee are noted in a memorandum from the Attorney General to the heads of all agencies issued at the time of the adoption of this section.

(c) The Committee is instructed to make every possible effort to advance the objective of the fullest responsible disclosure. To this end, in connection with its consultations with agencies that propose to issue final denials under the Act, the Committee shall, in addition to advising the agency with respect to the legal issues, invite the attention of the agency to the range of public policies reflected in the Act, including the central policy of the fullest responsible disclosure. The Committee may also request assistance and make studies and recommendations to carry out the intent of this paragraph.

Dated: July 11, 1973.

ELLIOT L. RICHARDSON, *Attorney General.*

JULY 11, 1973.

MEMORANDUM TO HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

Re Coordination of Certain Administrative Matters under the Freedom of Information Act, 5 U.S.C. 552.¹

A matter of government-wide importance, and increasing interest in Congress, is the need for improved administration of the Freedom of Information Act. In this memorandum I wish to bring you up to date on several actions which the Justice Department is taking (Part I), and to request your assistance on one of these actions (Part II).

I.

On June 26, 1973 I testified before three Senate subcommittees holding joint hearings on various bills pertaining to the general subject of government secrecy. A major portion of my testimony was directed toward S. 1142, a bill to amend the Freedom of Information Act. A companion House bill, H.R. 5425, had been the subject of hearings on May 8th, at which we were asked to testify on behalf of the Administration and opposed most of the proposed amendments.

During my June 26th testimony, while reiterating our opposition to most of the proposed amendments, I gave major emphasis to our determination to act on the well-publicized and recurrent problems of inadequate disclosure which stimulate such proposals, stating that "the real need is not to revise the Act extensively but to improve compliance." After summarizing some of the causes of less-than-ideal compliance and some of the means we are considering to upgrade it, I announced four steps which the Justice Department will take immediately, as follows:

"First, we will request the Civil Service Commission to include Freedom of Information material in its executive training and legal training programs and to assist us in arranging for inclusion of similar material in other programs for training government personnel.

"Second, we will conduct an interagency symposium on the Freedom of Information Act before the end of this year, to emphasize the need for improved administration and to provide the wider sharing of problems and ideas. This symposium will involve two-day communications as well as direct presentations, and we plan to invite the participation of Congressional and private speakers.

"Third, we will promptly institute discussions with the Administrative Conference of the United States, the Civil Service Commission, the Office of Management and Budget, and perhaps other agencies, seeking their assistance in launching a comprehensive study of how the Executive Branch can better organize itself to administer the Act, both within and among the agencies. This study will cover staffing, budgeting, training, and meeting the need for research in the application of the Act to major areas like government procurement, regulatory programs, law enforcement, and computerized records. It will cover the extent to which desirable improvements should be effected by legislation, executive order, or departmental orders. It will take account of inputs from outside the Executive Branch, and it is designed to point the way to sound and relatively permanent improvements, including greater speed of processing, greater uniformity, and greater disclosure. Our objective will be to have this study launched within 90 days and completed with one year, with reports to be furnished to Congress.

"Fourth, I will immediately remind all federal agencies of this Department's standing request that they consult our Freedom of Information Committee before issuing final denials of requests under the Act. In this connection I will order our litigating divisions not to defend freedom of information law suits against the agencies unless the Committee has been consulted. And I will instruct the Committee to make every possible effort to advance the objective of the fullest responsible disclosure."

¹ The Freedom of Information Act provides for the compulsory disclosure upon the request of "any person" of all agency records not exempted by the Act, confers administrative responsibility on each agency with respect to its own records, and makes the agency's final decisions subject to judicial review, in which the agency has the burden of justifying denials of access. The Department of Justice conducts litigation in defense of agency determinations under the Act and furnishes certain advisory and other services. Most of the Department's litigation functions in this area are conducted by the Civil Division, and the advisory and other functions are conducted by the Office of Legal Counsel.

II.

We wish to implement the fourth action set forth above with the maximum understanding and the least friction possible. There is a major need for closer coordination in the freedom of information field, and it is the responsibility of the Department of Justice to provide that coordination.

Your attention is invited to our standing request on this subject, originally set forth in this Department's December 8, 1969 memorandum to the general counsels of all federal departments and agencies, as follows:

"We request that in the future you consult this Department before your agency issues a final denial of a request under the Freedom of Information Act if there is any substantial possibility that such denial might lead to a court decision adversely affecting the government. Such consultation . . . may also enable us to assist you in reaching a disposition of the matter reasonably satisfactory both to your agency and to the person making the request."

In this 1969 memorandum, the Department also announced the establishment and initial membership of a committee of lawyers in the Office of Legal Counsel and the Civil Division, now known as the Freedom of Information Committee, to conduct such consultations.² Up to the present, the Committee has conducted more than 200 consultations with agencies, and its work has been conducted with speed and informality.³

We would very much appreciate it if you would arrange to make sure that the appropriate persons within your agency are aware of our standing request, as just discussed. In addition, it would be most helpful to the overall government objective of the fullest responsible disclosure if your agency could make special provisions, if none now exist, for speedy and careful review at the highest agency level in any cases in which officials of your agency, after consulting the Committee and receiving advice to the contrary, adhere to an intention of issuing a final denial.

Please feel free to call us if you have any questions about the foregoing. We hope that through the procedures and actions mentioned in this memorandum, and through exchanges of experience and views on problems of common interest, the administration of the Act can be steadily and significantly improved, to the ultimate benefit of each agency, the entire government, and the public.

ELLIOT L. RICHARDSON, *Attorney General*.

² The current membership of the Committee is Robert L. Saloschin, ext. 2674, chairman, John Gallinger, ext. 2038, and Deputy Assistant Attorney General Leon Ulman, ext. 2051, chairman *ex officio*, all of the Office of Legal Counsel, and Jeffrey Axelrad, ext. 3300, and Walter Fleischer, ext. 3354, both of the Civil Division. The Committee maintains cooperative arrangements with the Tax Division, which handles litigation under the Act involving Internal Revenue Service records, under which that Division screens proposed final denials of such records and refers them to the Committee in cases of doubt which may affect agencies in addition to the Service.

³ For a brief description of the work of the Committee by its chairman, see 23 Admin. Law Rev. 147. For a recent discussion of its work, see House Report No. 92-1419 on the Administration of the Freedom of Information Act (the "Moorhead Report") of September 20, 1972 at pp. 66-69.

SECRECY IN GOVERNMENT**PART 1—CLASSIFICATION GUIDE****ASD-2****AIR FORCE SYSTEMS COMMAND
SECURITY CLASSIFICATION GUIDE****F-111A/C/D/E/F, RF-111A AND FB-111A
MARCH 1971****LOCAL REPRODUCTION IS AUTHORIZED****HEADQUARTERS
AERONAUTICAL SYSTEMS DIVISION
AIR FORCE SYSTEMS COMMAND
UNITED STATES AIR FORCE**

THIS GUIDE SUPERSEDES SECURITY CLASSIFICATION GUIDE F-111A/C/D/E/F, RF-111A AND FB-111A, MARCH 1970 AND LETTER CHANGE #1, 19 JUNE 1970, LETTER CHANGE #2, 21 SEPTEMBER 1970 AND LETTER CHANGE #3, 16 NOVEMBER 1970. COPIES OF SUPERSEDED GUIDANCE SHOULD BE REMOVED FROM FILES AND DESTROYED.

AERONAUTICAL SYSTEMS DIVISION (AFSC)

SECURITY CLASSIFICATION GUIDE

F-111A/C/D/E/F, RF-111A AND FB-111A

MARCH 1971

HEADQUARTERS

AERONAUTICAL SYSTEMS DIVISION (AFSC)

UNITED STATES AIR FORCE

WRIGHT-PATTERSON AIR FORCE BASE, OHIO 45433

LOCAL REPRODUCTION AUTHORIZED

This guide supersedes the Security Classification Guide F-111A/C/D/E/F, RF-111A and FB-111A, March 1970, and Letter Change #1, 19 June 1970, Letter Change #2, 21 September 1970, and Letter Change #3, 16 November 1970. Copies of superseded guidance should be removed from files and destroyed.

AFLC-WPAFB-MAR 71 400

Security Classification Guide
F/RF/FB-111 Programs

March 1971

HEADQUARTERS
AERONAUTICAL SYSTEMS DIVISION (AFSC)
UNITED STATES AIR FORCE
WRIGHT-PATTERSON AIR FORCE BASE, OHIO 45433

FOREWORD

1. PURPOSE: The purpose of this guide is to provide a basis for evaluating the degree of protection necessary for documents, photographs, equipment, material and information concerning the F-111A/C/D/E/F, RF-111A and FB-111A.
2. USE OF THE GUIDE: This guide will be used as the basis for security classification determination of all documents, photographs, equipment and information pertaining to the F-111 program. Clarification of the guidance outlined in this guide or additional guidance determined to be necessary in a specific instance, will be furnished by ASD/FTI.
3. AUTHORITY: This guide has been published under authority of paragraph 2-15, AFR 205-1, dated 2 January 1968, as revised, to provide basic classification policy to its agencies and other contractors, and to other government agencies involved in this program.
4. OFFICE OF PRIMARY RESPONSIBILITY: Industrial Security Office, 4950th Test Wing (Technical), Aeronautical Systems Division.

FOR THE COMMANDER


BURTON J. GATES

Acting Chief, Industrial Security Office
4950th Test Wing (Technical)

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SECTION I

GENERAL SECURITY INSTRUCTIONS

1. EXPLANATION OF TERMS: The following is a list of abbreviations and definitions used through this guide.

- | | |
|----------------------|---|
| a. ASD | -Hq Aeronautical Systems Division
Air Force Systems Command
United States Air Force
Wright-Patterson AFB, Ohio 45433 |
| b. ASD/FTI | -Industrial Security Office
4950 Test Wing (Technical)
Aeronautical Systems Division |
| c. ASD/OIP | -Public Information Division
Information Office |
| d. ASD/IND | -Data Base Management Division
DCS/Foreign Technology |
| e. ASD/YB | -Deputy for F-111 |
| f. News Media | -Members of the press, radio,
television or other agencies
concerned with the public release
of information |
| g. Foreign Nationals | -All persons not citizens of, or
immigrant aliens to, the United
States. Citizens of the United
Kingdom (UK) and Canada, although
given reciprocal access authorizations
as employees of AF contractors are in
this category. |
| h. Release | -Releases include news articles,
speeches, stories, photography,
both still and motion, brochures,
advertisements, presentations and
displays, etc. |

2. CLASSIFICATION AUTHORITY: The security classification guidance contained in this guide is effective upon receipt. Classification changes appearing in any of the items within this guide constitute authority for regrading of previously classified documents. The paragraph and section number of this guide will be cited as authority for effecting the regrading of classification of documents, photographs, equipment, and material.

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SECTION I (Cont'd)

GENERAL SECURITY INSTRUCTIONS

3. REQUESTS FOR CLASSIFICATION CHANGES: If the security classification contained herein imposes impractical controls or if the progress of any phase of the system development indicates that classification changes are appropriate and advisable, the contractor/military facility concerned will forward documented recommendations to ASD/FTI.
4. REVISIONS: Revisions to this guide will be effected by the issuance of a letter, subject: Letter Change No. _____ to Security Classification Guide F-111A/C/D/E/F, RF-111A and FB-111A. These letters will indicate the appropriate change and will constitute the authority for such revision. Upon receipt of a revision letter, the appropriate change will be made and letter of authority will be inserted in front of the guide as the basis or authority for the change(s).
5. AUTOMATIC, TIME-PHASED DOWNGRADING AND DECLASSIFICATION: Specific items of information will be regraded or declassified in accordance with AFR 205-2 and/or the Industrial Security Manual as indicated by the group coding given with each item.
6. REQUEST FOR DETERMINATION OF PROPER SECURITY CLASSIFICATION: All information submitted for a determination of proper security classification will be directed to ASD/FTI.
7. ACCESS TO CRITICAL NUCLEAR WEAPONS DESIGN INFORMATION: Contractor access to Critical Nuclear Weapons Design Information (CNWDI) in support of the application of the AGM-69A (SRAM) to the F-111 will require written certification of the applicable contract administration activity. The contractor will assure that only those individuals who have a strictly evaluated need-to-know and a final security clearance of appropriate level granted in accordance with DOD industrial clearance policies are included on access lists. The applicable Defense Contract Administration Service Activity which has security cognizance over the facility will be responsible for briefing facility securing supervisors as to the importance of CNWDI and the procedural requirements for its control. Facility security supervisors will be responsible for briefing other contractor personnel on approved access lists. Certification and briefing of AF military and/or civilian personnel will be governed by AFR 205-1 as implemented.

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SECTION II

RELEASE OF INFORMATION1. PUBLIC RELEASE OF OFFICIAL INFORMATION:

a. a. Any public release of official information pertaining to this program shall be forwarded to Hq ASD/OIP for review and further processing. This includes proposed publicity releases by prime contractors under paragraph 5n, Industrial Security Manual for Safeguarding Classified Defense Information (ISM). The term "release" applies, but is not limited, to articles, speeches, photographs, brochures, advertisements, displays, presentations, etc., on any phase of this program. It is incumbent upon defense contractors, or other agencies, to screen all information submitted by them for release approval to insure that it is both Unclassified and technically accurate. Letters of transmittal shall contain certification to this effect. Requests for public release of information shall be mailed to Hq ASD in the same manner required for Confidential information pending final determination of its releaseability or continued protection as classified Defense Information.

b. Contemplated visits of public media representatives shall receive prior coordination with Hq ASD/OIP when the information to be disclosed has not been officially approved for public disclosure.

c. Only information which already has been approved for public release may be released without further recourse. Information developed after initial approval for public release must be submitted for review and further processing as outlined in paragraph 1.a. above.

d. Prime contractors are responsible for each of their subcontractors complying with these requirements. Subcontractors must submit any material prepared by them for public release approval through their prime contractor. The latter shall make appropriate comments if he concurs in the release, or he may reject the proposal without further recourse, if appropriate.

2. UNILATERAL PUBLIC RELEASE OF OFFICIAL INFORMATION: Unilateral public release of marked or unmarked official information pertaining to this program is expressly prohibited. Replies to queries from unofficial sources may be made only after the express approval of the OPR has been obtained (as outlined in paragraph 1, above). No other dissemination or approval procedure is authorized. This prohibition extends to all publications, both in-house and external, and to all conversations, speeches, or oral statements, except those made in the normal conduct of official business. The need-to-know principle shall be applied at all times.

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SECTION II (Cont'd)

RELEASE OF INFORMATION

4. DISSEMINATION OF UNCLASSIFIED TECHNICAL INFORMATION TO A FOREIGN GOVERNMENT OR ITS AGENT AND RELEASE OF UNCLASSIFIED TECHNICAL INFORMATION IN FOREIGN COUNTRIES: The exchange of Unclassified technical information on this program with the Australian Government or their agents will be in accordance with established procedures agreed upon between the referenced government and the US Air Force. This also applies to disclosures of Unclassified information to contractor personnel assigned to Australia when such information is required for the furtherance of the RF/F-111C program. All other requests for disclosure of Unclassified technical information on this program will be forwarded to ASD/INB if it is intended for a foreign government or to ASD/OIP if it is intended for a non-government agency or individual located in a foreign country.

5. RELEASE OF CLASSIFIED INFORMATION AT CLASSIFIED SYMPOSIUMS, SEMINARS, OR TECHNICAL SOCIETY MEETINGS: All speeches, presentations, etc., to be released at classified symposiums or seminars or technical society meetings will be submitted to ASD/YB for approval, a minimum of 30 days prior to the proposed date of release. The request for review of the document and approval of its presentation will include the name of the individual making the presentation; date of the presentation; title of the symposium, seminar, technical society meeting, etc.; a statement to the effect that the paper has been reviewed for technical competency and proper security classification, and that the paper does not contain information regarding patented information which has been subjected to the Patent Secrecy Act.

6. RELEASE OF CLASSIFIED INFORMATION TO FOREIGN NATIONALS WITH A CANADIAN OR UNITED KINGDOM RECIPROCAL PERSONNEL SECURITY CLEARANCE: In addition to classified information specifically excluded under paragraph 29d(1), Industrial Security Manual (ISM), the following applies: "Foreign National employees of the contractor or subcontractor(s), including those possessing Canadian or United Kingdom reciprocal clearance, are not authorized access to classified information resulting from, or used in the performance of, this contract unless authorized in writing by the procuring contracting activity. This requirement does not apply to immigrant alien employees of the contractor. If information used in performance of this contract has been previously authorized for release to Canadian or United Kingdom citizens, access is approved."

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SECTION III

ADMINISTRATIVE DETAILS

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. A complete list of contractors	U	
2. The relationship of prime and associate contractors to one another or to this Headquarters	U	
3. Material priorities	According to master urgency list	
4. Company project numbers	U	
5. Contract numbers	U	
6. Contractor model designations	U	
7. Complete planning or programming	U/C(4)	Classify according to content consistent with nature of information disclosed and guidance outlined in this guide. See Section IV for guidance regarding programmed quantities and schedules.
8. Complete program status	U/C(4)	Classify according to content. See Section XLIV for guidance on operational capability date, equipage dates, etc.

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SECTION IV

FUNDING, PROCUREMENT AND PRODUCTION

<u>Information Revealing</u>	<u>Class and Gp Code</u>	<u>Remarks</u>
1. Cost information, pricing or funding pertaining to any F-111 type, model, series aircraft RDT&E efforts	U	
2. Production Costs:		
a. Unfunded costs or prices which relate to programmed quantities and/or option buy quantities beyond those identified in current F-111 contract(s)	C(4)	
b. Costs or prices relating to production buy quantities and/or options reflected in current F-111 contract(s)	U	
3. Production and Delivery Schedules:		
a. Planned production buy quantities beyond those identified in current F-111 contract(s)	C(4)	
b. Number and delivery schedules for RDT&E and production aircraft identified in current F-111 contracts(s)	U	
c. Subsystem quantities and schedules	U	Provided they do not relate to classified requirements indicated in Item 3a above.

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SECTION V

COMPLETE OR END ITEM

<u>Information Revealing</u>	<u>Class and Gp Code</u>	<u>Remarks</u>
1. Complete or major design data	U-S(3)	See sections on subsystems for specific design data requiring classification
2. Specific Performance:		
a. Speed/altitude envelope	U/C(4)	Unclassified for F-111A/C/D/E and FB-111A. Confidential (Gp-4) for all other type, model series.
b. Combat ceiling	U/C(4)	Unclassified for F-111A/C/D/E and FB-111A. Confidential (Gp-4) for all other type, model series.
c. Speeds and/or altitudes	U/C(4)	Unclassified for F-111A/C/D/E and FB-111A. Confidential for all other type, model series when identified as a maximum flight condition or specifically identified as a limitation of weapon system performance. Otherwise, Unclassified.
d. Acceleration/deceleration limitations	U/C(4)	Unclassified for F-111A/C/D/E and FB-111A. Confidential (Gp-4) for all other type, model series.
e. Navigation accuracy required by specification or attained by flight test	U/C(4)	See other sections of this guide for classification of navigational accuracies of specific navigational equipment.
f. Maneuverability limitations	U/C(4)	Unclassified for F-111A/C/D/E and FB-111A. Confidential for all other type, model series.

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SECTION V (Cont'd)

COMPLETE OR END ITEM

<u>Information Revealing</u>	<u>Class and Op Code</u>	<u>Remarks</u>
g. Maximum range	U/C(4)	Unclassified for F-111A/C/D/E and FB-111A. Confidential for all other type, model series when identified with take-off configuration, gross weight, flight profile or other similar factors that determine range attainable.
h. Landing/take-off distances	U	
i. Fuel capacity	U	Fuel consumption for the RF-111A and F-111F is Confidential (Op-4) if the amount of fuel required for operation with respect to aircraft time and distance is revealed. This information for the F-111A/C/D/E and FB-111A is Unclassified.
3. General Performance	U	
h. Physical Characteristics:		
a. Length/diameter	U	
b. Weight-gross weight/maximum take-off gross weight	U	
5. External photographs, including models, mock-ups showing configuration	U	
6. Internal photographs and drawings		Classify according to nature of information revealed.
7. Signature Characteristics:		
a. Engine plume	C(4)	
b. Aircraft radar cross section	C(4)	In landing mode is Unclassified.

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SECTION V (Cont'd)

COMPLETE OR END ITEM

<u>Information Revealing</u>	<u>Class and Gp Code</u>	<u>Remarks</u>
c. Ferrite tiles/panels	U	Applies to ferrite tiles or dielectric honey comb panels as end items including design specifications and/or manufacturing processes.
8. Estimates on proven conclusions as to weapon system capability or operational limitations	U-S(3)	Aircraft penetration ability studies are Secret. Also see Item 2 above and other sections of the guide for subsystem classifications.
9. Countercountermeasures	C-S(3)	See other sections of guide for specific guidance of electronic subsystems.
10. Reliability	U	Unclassified unless degraded performance as an operational deficiency of the aircraft is revealed. See Item 2 of this section for guidance. See other sections for reliability classification guidance which apply to subsystems.

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SECTION VI

PROPULSION SUBSYSTEMS

1. The TF30-P-1, TF30-P-3, TF30-P-7, TF30-P-9 and TF30-P-12 engines as end item equipments, including their internal design and/or performance characteristics are Unclassified.

2. The TF30-P-100 engine is classified as follows:

<u>Information Revealing</u>	<u>Class and Gp Code</u>	<u>Remarks</u>
a. Altitude of Engine	C (4)	
b. Design Information	U	Applies to engine design characteristics including afterburner and exhaust nozzle design.
c. Specific fuel consumption	C (4)	
d. Infrared Emission Characteristics	C (4)	
e. Thrust class	U	
f. Specific thrust rating	C (4)	
g. Maximum speed	C (4)	
h. End item assembled engine	U	External configuration is also Unclassified.

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SECTION VII

AN/ALQ-94 (XA-1) Electronic Countermeasures Equipment (ECM)

<u>Information Revealing</u>	<u>Class & Gp Code</u>	<u>Remarks</u>
1. Accuracy	C(3)	Applies to tolerances of thresholds, decisions RF oscillators, etc.
2. Electronic Countermeasures Capability	S(3)	Information pertaining to operational capability against specific threats (such as flight test reports, etc.).
3. Signature Characteristics	C(3)	Applies to modulation characteristics, specific frequencies, bandwidths, power output, sensitivity, specific prf's or range of prf's, frequency bands of traveling wave tubes and other similar type characteristics. Bands used in terms of letter designation are Unclassified.
4. Multiple Signal Handling Capability	C(3)	
5. Vulnerability to Countermeasures	S(3)	Applies to information specifically addressing techniques or means by which the ECM equipment can be countered

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SECTION VII (Cont'd)

<u>Information Revealing</u>	<u>Class & Gp Code</u>	<u>Remarks</u>
6. Operating Mode Information	U	Unclassified unless including information otherwise classified in this section.
7. Resolution	C(3)	Applies to information which reveals specific resolution of threats. Equipment design resolution is Confidential (Gp 3). Resolution is Secret (Gp 3) when related to capabilities against specific threats.
8. Antennas (Software)	U/C(3)	Radiation Coverage Characteristics are Unclassified except for frequency band coverage which is Confidential (Gp 3). Power handling characteristics are Confidential (Gp 3).
9. Reliability	U/S(3)	Unclassified unless it relates to significant degraded performance of the overall set. The latter will be Secret (Gp-3).
10. Hardware is classified as follows:		
AN/ALQ-94 Counter-measures Set	C(3)	External views which reveal frequency or other signature characteristics are Confidential (Gp 3). Otherwise, such views are Unclassified.
AM-4850/ALQ-94 through AM-4852/ALQ-94 Amplifier, Radio Frequency	C(3) 12	

SECTION VII (Cont'd)

<u>Information Revealing</u>	<u>Class & Gp Code</u>	<u>Remarks</u>
R-1497/ALQ-94 through R-1499/ALQ-94, Receiver, Counter- measures	C(3)	
C-7410/ALQ-94 and C-7940 ALQ-94 Control Indicator	U	
MT-3877/ALQ-94 through MT-3879/ALQ-94, Rack Electrical Equipment	U	
AS-2101/ALQ-94 through AS-2106/ALQ-94 Antenna Assembly	U	
AS-2521/AL Antenna Assembly	U	
CU-1707/ALQ-94 through CU-1715/ALQ-94 Power Divider	U	

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SECTION VIII

AN/APS-109/A/B/C RECEIVING SETS, RADAR

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Bearing and boresight accuracies	C(3)	
2. Sensitivity requirements	C(3)	
3. Intelligence data concerning potential radar threats	S(3)	
4. Identification criteria used for potential enemy radar threats	S(3)	
5. Utilization of countermeasures against radar threats	S(3)	
6. Specific detail of tie-in with countermeasures equipment when overall penetration aids capabilities or limitations are revealed	S(3)	
7. Passive ranging capability	C(3)	
8. Utilization of range data	S(3)	
9. Frequency range (and band limits)	C(3)	
10. Single and/or multiple discreet frequencies	C(3)	
11. Field of view	U	
12. Band designations by letter only	U	
13. Range (Sensitivity)	C(3)	
14. Reliability	U-C(3)	Unclassified unless degraded performance as an operational deficiency of the subsystem is revealed.

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SECTION VIII

AN/APS-109/A/B/C RECEIVING SETS, RADAR

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
15. Resolution	C(3)	
16. System Capacity	U	
17. Specific types of radar identifiable by the subsystem	U	
18. Hardware is classified as follows:		
AN/APS-109/A/B/C Radar Receiving Sets	C(3)	External views of face of units revealing scope markings are Confidential (Gp-3), including the indicator-control sub- assemblies and plate assemblies.
R-1304/APS-109 Radar Receiver	C(3)	
R-1305/APS-109 Radar Receiver	C(3)	
R-1643/APS-109A Radar Receiver	C(3)	
R-1644/APS-109A Radar Receiver	C(3)	
CM-317/APS-109 Processor Vidio Signal	C(3)	
CM-392/APS-109A Processor Vidio Signal	C(3)	
AS-1718/APS-109 through AS-1725/ APS-109 Antenna-Radome	U	
AS-1780/APS-109 through AS-1782/ APS-109 Antenna-Radome	U	
C-6458/APS-109 Control-Indicator	C(3)	

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SECTION VIII (Cont'd)

AN/APS-109A/B/C RECEIVING SETS, RADAR

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
C-8179/APS-109A Control-Indicator	U	
C-8361/APS-109B Control-Indicator	U	
SB-2397/APS-109 Panel Indicator	U	
SB-3355/APS-109A Panel Indicator	U	
SB-3356/APS-109B Panel Indicator	U	
SB-3398/APS-109C Panel Indicator	U	
MT-3358/APS-109 Chassis, Electrical Equipment	U	
MT-4225/APS-109A Chassis, Electrical Equipment	U	
CJ-1458/APS-109 Coupler, Radar Receiver	U	

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SECTION IX

AN/AAR-34, RECEIVING SET, INFRARED

<u>Information Revealing</u>	<u>Class and Gp Code</u>	<u>Remarks</u>
1. Detection capability accuracy	C(3)	
2. Search field	C(3)	
3. Track field	C(3)	
4. Wave length (spectralbands)	C(3)	
5. Detection technique	C(3)	
6. Tracking limitation	C(3)	
7. Composition of detector material	C(3)	
8. Sensitivity	C(3)	
9. Reliability	U	Provided degraded performance as an operation deficiency is not revealed. The latter will be Confidential (Gp-3)
10. Resolution	C(3)	
11. Tracking capacity	C(3)	
12. Vulnerability	C(3)	
13. Hardware is classified as follows:		
AN/AAR-34 Receiving Set, Infrared Set	C(3)	
CV-2630/AAR-34 Scanner Search Track	C(3)	Includes Optical System Receiver, Lens and Dewar. External views of Optical System Receiver are also Confidential (Gp-3)
C-8250/AAR-34 Control, Receiver	U	
MX-6708/ALR-23 Converter Cryogenic	U	
CH-542/ALR-23 Chassis Elect. Equipment	U	
CM-389/AAR-34 Processor Video Signals	U	

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SECTION X

AN/APQ-113, ATTACK RADAR

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Accuracy in air mode	C(4)	
2. Accuracy in ground mode	C(4)	
3. Counter countermeasures capability	C(3)	
4. Air-to-air range of radar set	C(4)	
5. Reliability	U	Unclassified unless degraded performance as an operational deficiency is revealed in which case a Confidential classification applies.
6. Resolution	U	
7. Frequency range	U	
8. Frequency tuning characteristics	C(4)	
9. Pulse width (band width)	U	
10. Pulse repetition frequency	U	
11. Receiver recovery time	U	
12. Power output	U	
13. Band designation by letter	U	
14. System capacity	U	
15. CCM techniques with specifics	C(3)	
16. CCM techniques without specifics	U	
17. Scan limits	U	
18. The combination of transmission coefficients and specific frequencies or frequency ranges as a design requirement or measured performance of special opaque radome only	C(4)	Not applicable to standard radome. See "Note" on page 19

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SECTION X (Cont'd)

AN/APQ-113, ATTACK RADAR

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
19. Radar scope photographs		Classify according to information disclosed as to areas covered and performance characteristics of radar.
20. Hardware is classified as follows:		
AN/APQ-113 Radar Set	U	
MD-608/APQ-113 Modulator		
Receiver-Transmitter (GE P/N 7635519)	U	Includes Magnetron Assembly (GE P/N 7635893 and P/N 7635075)
CW-790/APQ-113 Radome	U	
AS-1749/APQ-113 Antenna Assy	U	
C-6498/APQ-113 Control Antenna	U	
MT-3384/APQ-113 Rack, Elec Equipment	U	
C-6500/APQ-113 Control Antenna Indicator	U	
C-6499/APQ-113 Radar Set	U	
AB-902/APQ-113 Pedestal, Antenna	U	
SN-380/APQ-113 Synchronizer Electrical	U	
CG-3180/APQ-113 Waveguide Assembly	U	
IP-777/APQ-113 Indicator Recorder Unit	U	

NOTE: The Special Opaque Radome (GE P/N 0757020) and technical data pertaining thereof will continue to be classified Confidential(GP-4)

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SECTION XI

AN/ALE-28, COUNTERMEASURES DISPENSER AND RR-119, INFRARED FLARE

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Rise time of flare	C(3)	Shown in specification requirements
2. Intensity of flare	C(3)	Shown in specification requirements
3. Frequency range of flare	C(3)	Shown in specification requirements
4. Burn time characteristics	C(3)	Shown in specification requirements
5. Dispensing rate of chaff or flare	U-C(3)	Design specification requirements are Unclassified. Specific settings and capacities for individual operational missions will be Confidential.
6. Ejection velocity of chaff or flare	U	
7. Flare composition	C(3)	Raw and processed materials are Unclassified. Percentages of component materials and manufacturing processes of flare composition are Confidential.
8. Signature characteristics of flare	C(3)	
9. System capacity	U-C(3)	Design specification requirements are Unclassified. Specific capacity for individual operational missions will be Confidential.

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SECTION XI (Cont'd)

AN/ALE-28, COUNTERMEASURES DISPENSER AND RR-119, INFRARED FLARE

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
10. Reliability	U-C(3)	Unclassified unless degraded performance as an operational deficiency is revealed.
11. Hardware:		
AN/ALE-28	U	
RR-119 Flare	U	

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SECTION XII

AN/APQ-110, AN/APQ-134 AND AN/APQ-146 TERRAIN FOLLOWING RADARS

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Statistical description of flight profile	C(4)	
2. Reduced data showing TFR flight profiles	C(4)	
3. Raw data in a non-reducible form	U	
4. Raw data in a reducible form	C(4)	
5. Simulated TFR flight data revealing flight profile	C(4)	
6. Clearance setting of the AN/APQ-110, AN/APQ-134 and AN/APQ-146	U	
7. Operating frequency range	U	
8. Command equation with values of constants	C(4)	
9. Pulse width	U	
10. Reliability	U-C(4)	Unclassified unless degraded performance as operational deficiency is revealed.
11. Resolution, angular or range	U-C(4)	Classified Confidential when antenna characteristics disclose values related to Item 8 above.
12. The AN/APQ-110, AN/APQ-134 and AN/APQ-146 and components thereof as end item hardware are Unclassified.		

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SECTION XIII

AN/AJQ-20, NAVIGATION AND ATTACK SET/AN/AJN-14 NAVIGATION SET

<u>Information Revealing</u>	<u>Class and Gp Code</u>	<u>Remarks</u>
1. Design information	U	
2. Performance characteristics	U	
3. Hardware:		
AN/AJQ-20 and components	U	External views are Unclassified
AN/AJN-14 and components	U	External views are Unclassified

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SECTION XIV

AN/APN-189, RADAR DOPPLER SET

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Accuracy	U	
2. Operational readiness (alert) time/time cycle	U	
3. Reliability	U	
4. Signature Characteristics	U	
5. System Capacity	U	
6. Vulnerability	U	
7. The AN/APN-189 and components thereof as end item hardware are Unclassified.		

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SECTION XV

AN/APQ-130, ATTACK RADAR SET

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Accuracy (air or ground mode)	C(3)	
2. Counter countermeasures capability	C(3)	
3. Operational readiness (alert time/time cycle)	C(3)	
4. Range (air-to-air)	C(3)	
5. Reliability	U-C(3)	Unclassified unless degraded performance as an operational deficiency is revealed.
6. Resolution	C(3)	
7. Signature characteristics (pulse width, frequency range, pulse repetition frequency, receiver recovery time, frequency tuning characteristics, and power output)	C(3)	
8. System capacity	C(3)	
9. Vulnerability	C(3)	
10. CCM techniques with specifics	C(3)	Unclassified without specifics
11. Scan limits	U	
12. Nuclear radiation protection design information		Unclassified unless nuclear source data requires classification or significant vulnerability is revealed. Vulnerability is Confidential(3).
13. Hardware is classified as follows:		
AN/APQ-130	C(3)	External views of AN/APQ-130 are unclassified provided classified signature characteristics are not revealed or disclosed.
Components: Antenna, Master Frequency Generator and Transmitter (with TWT installed)	C(3)	The transmitter without TWT is Unclassified.

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SECTION XVI

INERTIAL NAVIGATION SET AN/AJN-16

(Formerly Inertial Navigation Set F-111D/FB-111, F-111K)

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Accuracy (Navigation and Bombing)	C(3)	
2. Operational readiness (alert time/time cycle)	U	
3. Reliability	U-C(3)	Unclassified unless degraded performance as an operational deficiency is revealed.
4. Nuclear radiation protection design information		Unclassified unless nuclear source data requires classifica- tion or significant vulnerability is revealed. The latter is Confidential(GP-3)
5. Hardware:		
AN/AJN-16	U	
Components:		
MX-8131/AJN-16 stabilized platform	U	
CP-945/AJN-16, computer navigational	U	
C-7719/AJN-16, Control- Power Supply, Battery	U	

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SECTION XVII

AN/AYK-6, DIGITAL COMPUTER AND CV-2492A, CONVERTER SET

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Operational readiness (alert time/time cycle)	C(3)	
2. Reliability	U-C(3)	Unclassified unless degraded performance as an operational deficiency is revealed.
3. Nuclear radiation protection design information		Unclassified unless nuclear source data requires classification or significant vulnerability is revealed. The latter is Confidential (GP-3).
4. Hardware (without stored data):		
AN/AYK-6 Computer	U	When computer programs and data are stored in a computer, the computer will be classified to the level of the stored data.
CV-2492A Converter	U	

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SECTION XVIII

AIM-7G, AIR-TO-AIR MISSILE (SPARROW)

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Accuracy	C(3)	
2. Counter countermeasures capability	C(3)	
3. Formula or material	C(3)	
4. Fuel/propellant type	C(3)	
5. Fuel/propellant consumption	C(3)	
6. Fuel/propellant capacity	C(3)	
7. Operational readiness (alert) time/time cycle	C(3)	
8. Reliability	U-S(3)	Unclassified unless degraded performance as an operational deficiency is revealed.
9. Signature characteristics	C(3)	
10. System capacity	C(3)	
11. Vulnerability	C(3)	
12. Thrust, class	C(3)	
13. Thrust, specific	C(3)	
14. Thrust, specific impulse	C(3)	

SECTION XVIII (Cont'd)

AIM-7G, AIR-TO-AIR MISSILE (SPARROW)

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
15. Burn time	C(3)	
16. Specific target capability	S(3)	
17. Theoretical and operational capability in a countermeasure environment	S(3)	
18. Kill probability against specific targets	S(3)	
19. Fusing capabilities and theory of operation	S(3)	
20. Seeker ranges, minimum and maximum	C(3)	
21. Minimum effective range	C(3)	
22. Altitude capabilities	C(3)	
23. Lethal range of warhead	C(3)	
24. Operating frequency bandwidth	C(3)	
25. Coding	C(3)	
26. Maneuvering capabilities, limitations and restrictions	C(3)	
27. Maximum opening and closing velocity	C(3)	

SECTION XVIII (Cont'd)

AIM-7G, AIR-TO-AIR MISSILE (SPARROW)

	<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
28.	Propulsion performance characteristics	C(3)	
29.	Certain general terms regarding target capability	C(3)	
30.	Program schedules	C(3)	
31.	Open view of guidance and control section	C(3)	
32.	External view of assembled, closed up missile	U	
33.	Weight and over-all dimensions of assembled missile	U	
34.	Compatability to aircraft	U	

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SECTION XIX

AN/APA-169, RADAR SET GROUP

(Formerly Air-to-Air Missile Ancilliary Equipment (Missile Control Set))

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Accuracy	C(3)	
2. Reliability	U	
3. Modulation characteristics	C(3)	
4. Power output	C(3)	
5. Exact frequency	C(3)	
6. Classified aspects of AN/APQ-130 Attack Radar and air-to-air missile (AIM-7G)	C-S(3)	See Sections XIV and XVII for specifics
7. Nuclear radiation protection design information		Unclassified unless nuclear source data requires class- ification or significant vulnerability is revealed. Vulnerability is Confidential (3).
8. Hardware is classified as follows:		
AN/APA-169, Radar Set Group	C(3)	
T-1075(XA-1)/APA-169	C(3)	
CV-2454(XA-1)/APA-169	U	
PP-6017(XA-1)/APA-169	U	
PP-6018(XA-1)/APA-169	U	

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SECTION XX

AN/APQ-128, TERRAIN FOLLOWING RADAR

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Statistical description of flight profile	C(4)	
2. Reduced data showing TFR flight profile	C(4)	
3. Raw data in non-reducible form	U	
4. Raw data in reducible form	C(4)	
5. Simulated TFR flight data revealing flight profile	C(4)	
6. Clearance settings of AN/APQ-128	U	
7. Operating frequency range	U	
8. Command equation with values of constants	C(4)	
9. Pulse width	U	
10. Reliability	U-C(4)	Unclassified unless degraded performance as operational deficiency is revealed
11. Resolution, angular or range	U-C(4)	Classified Confidential when antenna characteristics disclose values related to Item 8 above. Otherwise Unclassified.
12. The AN/APQ-128 and components thereof as end item hardware are	Unclassified.	
13. Nuclear radiation protection information		Unclassified unless nuclear data requires classification or significant vulnerability is revealed. Vulnerability is Confidential (GP-3).

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SECTION XXI

AN/ASQ-119, COMPASS, ASTRO, AUTOMATIC TRACKING

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Accuracy	C(4)	
2. Reliability	U-C(4)	Unclassified unless degraded performance as an operational deficiency is revealed.
3. The AN/ASQ-119 and components thereof as end item hardware are	Unclassified.	

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SECTION XXII

AN/APQ-111, AND AN/APQ-111, ATTACK RADAR SETS

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Accuracy in air mode	C(4)	
2. Accuracy in ground mode	C(4)	
3. Counter countermeasures capability	C(3)	
4. Air-to-air range of radar set	C(4)	
5. Reliability	U-C(4)	Unclassified unless degraded performance as an operational deficiency is revealed.
6. Resolution	U	
7. Frequency range	U	
8. Frequency tuning characteristics	C(4)	
9. Pulse width (band width)	U	
10. Pulse repetition frequency	U	
11. Receiver recovery time	U	
12. Power output	U	
13. Band designation by letter	U	
14. System capacity	U	
15. GCM techniques with specifics	C(3)	
16. GCM techniques without specifics	U	
17. Scan limits	U	
18. The combination of transmission coefficients and specific frequencies or frequency ranges as a design requirement or measured performance of the special opaque radome only		Not applicable to standard radome See note on page 19

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SECTION XXII (Cont'd)

AN/APQ-114, AND AN/APQ-144 ATTACK RADAR SETS

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
19. Radar scope photographs		Classify according to information disclosed as to areas covered and performance characteristics of radar.
20. Hardware is classified as follows:		
AN/APQ-114 and AN/APQ-144 Radar Sets	U	
AB-1035/APQ-114 Pedestal, Antenna	U	
AS-2123/APQ-114 Antenna Assy	U	
C-7486/APQ-114 Control Antenna	U	
C-7487/APQ-114 Control, Radar Set	U	
C-6500/APQ-113 Control, Antenna Indicator	U	
C-7857/APQ-114A Control, Radar Set	U	
C-8186/APQ-144B Control, Antenna Indicator	U	
CG-3433/APQ-114 Waveguide Assy	U	
CG-3523/APQ-114 Waveguide Assy	U	
CG-3547/APQ-114 Waveguide Assy	U	
CW-790/APQ-113 Radome	U	
IP-897/APQ-114 Indicator Recorder Unit	U	
IP-948A/APQ-114A Indicator Recorder Unit	U	
MD-764/APQ-114 Modulator-Receiver Transmitter	U	Includes Magnetron Assy
MD-843/APQ-144 Modulator-Receiver Transmitter	U	
MT-3384/APQ-113 Rack, Elect Equip	U	
SN-418/APQ-114 Synchronizer, Elect	U	
SN-449/APQ-144 Synchronizer, Elect	U	

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SECTION XXIII

AN/APN-185, RADAR SET, NAVIGATION

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Accuracy	U	
2. Operational readiness (alert) time/time cycle	U	
3. Reliability	U	
4. Signature characteristics	U	
5. System capacity	U	
6. Vulnerability	U	
7. The AN/APN-185 and components thereof as end item hardware are Unclassified.		

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SECTION XXIV

AN/AAS-21, DETECTING SET, INFRARED

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Operating frequencies	U	
2. Receiver bandwidth	C(3)	
3. Receiver sensitivities	C(3)	
4. Stabilization limits	U	
5. Scale factor	U	
6. Resolution	C(3)	
7. Instantaneous field of view	C(3)	
8. Noise equivalent temperature	C(3)	
9. Film sensitivity	U	
10. Geometric fidelity	C(3)	
11. Output accuracy	C(3)	
12. Altitude capabilities	C(3)	
13. Airspeed	C(3)	
14. Vulnerability to Countermeasures	S(3)	
15. Weather capability	U	
16. Velocity and height ratio	C(3)	
17. Hardware is classified as follows:		
AN/AAS-21 Detecting Set, Infrared	C(3)	External views which reveal any classified performance or technical characteristics identified above will be Confidential (Gp-3). Otherwise, such external views are Unclassified.

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SECTION XXIV (Cont'd)

AN/AAS-21 DETECTING SET, INFRARED

<u>Information Revealing</u>	<u>Class. and Gp Code</u> _ _	<u>Remarks</u> _
R-1446/AAS-21, Receiver, Infrared	C(3)	
RO-318/AAS-21, Receiver, Infrared	U	
MT-3754/AAS-21, Mounting	U	
MT-3755/AAS-21 Mounting	U	
C-7101/AAS-21, Control, Detecting Set	U	

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SECTION XXV

AN/APD-8, SIDE LOOKING RADAR

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Performance characteristics		
a. Output accuracies	C(3)	
b. Moving target indication	C(3)	
c. Altitude capabilities	C(4)	
d. Swath Width	U	
e. Airspeed	C(4)	Applies to aircraft speed/altitude envelope
f. System capacity	C(3)	Includes such aspects as maximum operations the system is capable of performing and programmed or selected operations capabilities.
g. Geometric fidelity	C(3)	
h. Weather capability	C(3)	
i. Modes of operation	U	
j. Stabilization limits	U	
k. Scale factor	U	
l. Resolution	C(3)	
2. Signature characteristics		
a. Operating frequencies	C(3)	
b. Pulse width	C(3)	
c. Pulse spectrum	C(3)	
d. Power output	C(3)	

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SECTION XXV (Cont'd)

AN/APD-8, SIDE LOOKING RADAR

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
e. Monopulse resolution	U	
f. Receiver Bandwidth	C(3)	
g. Receiver sensitivity (Specific)	C(3)	
h. Antenna patterns	U	
i. Antenna gain	C(3)	
j. Pulse recurrence frequency	C(3)	
3. Vulnerability to ECM	S(3)	
4. Imagery		Classify according to content consistent with information revealed or disclosed.
5. Hardware	<u>End Item</u>	<u>External View</u>
AN/APD-8 Radar Set	C(3)	Unclassified unless classified signature characteristics are revealed in which case a Con- fidential classification applies.
AS-2113/APD-8 Antenna	U	U
AS-2145/APD-8 Antenna	U	U
RT-874/APD-8 Receiver-Transmitter	U	U
R-1504/APD-8 Receiver	U	U
HD-782/APD-8 Air Electronic Equipment	U	U
MA-24/APD-8 Magazine, Film	U	U
SB-3073/APD-8 Panel, Monitor	U	U
PP-4891/APD-8 Power Supply	U	U

SECTION XXV (Cont'd)

AN/APD-8, SIDE LOOKING RADAR

<u>Information Revealing</u>	<u>End Item</u>	<u>External View</u>
HD-783/APD-8 Pressurizing Set	U	U
RO-337/APD-8 Recorder, Radar Mapping	U	U
OD-15/APD-8 Indicator Group	U	U
AB-1028/APD-8 Support, Antenna	U	U
AB-1029/APD-8 Support, Antenna	U	U
CG-3402/APD-8 Waveguide Assembly	U	U
CG-3403/APD-8 Waveguide Assembly	U	U
MT-3884/APD-8 Mount, Resilient	U	U
MT-3885/APD-8 Mount, Resilient	U	U
MT-3887/APD-8 Mount, Resilient	U	U
CW-940/APD-8 Radome	U	U
CW-941/APD-8 Radome	U	U
MT-3886/APD-8 Plate, Non-Resilient Mount	U	U
CN-1220/APD-8 Antenna, Stabilizer	U	U
CG-3404/APD-8 Waveguide Assembly	U	U
CG-3405/APD-8 Waveguide Assembly	U	U
MT-3888/APD-8 Mount Servo	U	U

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SECTION XXVI

AN/APN-159 ALTIMETER

<u>Information Revealing</u>	<u>Class. and Gr Code</u>	<u>Remarks</u>
1. Vulnerability to ECM	C(3)	
2. Weather capability	C(3)	
3. Operating frequencies	U	
4. Frequency coverage	U	
5. Pulse width	U	
6. Pulse shape	U	
7. Receiver bandwidth	U	
8. Pulse spectrum	U	
9. Power output	U	
10. Antenna patterns	U	
11. Antenna gain	U	
12. Range coverage	U	
13. Modes of operation	U	
14. The AN/APN-159 and components thereof as end item hardware are Unclassified.		

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SECTION XXVII

AN/ASQ-112, RECONNAISSANCE SUBSYSTEM CONTROL TEST SET

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Vulnerability to ECM	C(3)	
2. Accuracy	U	
3. System capacity	U	
4. Accuracies and/or maximum ranges for tie-in signals	U-S	See other sections of this guide related to the specific tie-in systems
5. Pulse recurrence frequency	U	
6. Weather capability	U	
7. Modes of operation	U	
8. V/H ratio	U	
9. Computer program	U-C(3)	Certain portions of the computer program are classified. Program tapes and logic diagrams shall be classified according to content.
10. The AN/ASQ-112 and components thereof as end item hardware are Unclassified.		

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SECTION XXVIII

AN/AVD-3, LASER RECONNAISSANCE SET

<u>Information Revealing</u>	<u>Class and Gp Code</u>	<u>Remarks</u>
1. Design/Performance Characteristics:		
a. Operational altitudes	C(3)	
b. System angular resolution	C(3)	
c. Beam divergence	C(3)	
d. Electronic bandwidth	C(3)	
e. Laser output power	C(3)	
f. System output power	C(3)	
g. Operational airspeeds	C(3)	
h. Velocity/altitude ratio range	C(3)	
i. Total field of view	C(3)	
j. Geometric fidelity	C(3)	
k. Scale factor	C(3)	
l. Effective focal length	C(3)	
m. Stabilization limits	U	
n. Film sensitivity	U	
o. Weather capabilities	U	
2. Hardware:		
AN/AVD-3	C(3)	External views are Unclassified unless design characteristics identified above are revealed in which case a Confidential (Gp-3) classification applies

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SECTION XXIX

AN/AVA-9, INDICATOR GROUP, INTEGRATED DISPLAY

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Designation/fixtaking accuracies	C(4)	
2. Radar scope photographs	U-C(4)	Classify only if they relate to performance of radar/navigation set.
3. Hardware:		
a. AN/AVA-9	U	
b. Components		
(1) IP-927/AVA-9 Indicator, Digital Display	U	
(2) IP-928/AVA-9, Indicator, Analog Display	U	
(3) SU-46/AVA-9 and SU-47/AVA-9, Sight Optical Display	U	
(4) CV-2499/AVA-99, Converter Radar Data	U	

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SECTION XXX

HORIZONTAL SITUATION DISPLAY

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Annotated Map Film and/or Data Frame Film		Unclassified unless requirement exists to classify for reasons of sensitivity of area covered which is identifiable on the film.
2. Hardware:		
Display set, horizontal situation AN/AYN-3	U	
a. Indicator, Horizontal Situation Display IP-979/AYN-3	U	Without film
b. Processor, Horizontal Situation Display MX-8386/AYN-3	U	
c. Generator, Digital Display Data SG-857/AY	U	Unique to FB-111

SECTION XXXI

CONTROL AND DISPLAY SETS

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Hardware:		
a. Stores Management Set	U	
b. Designation Controls	U	
c. Panels:		
(1) Navigation Data Entry	U	
(2) Navigation Data Display	U	
(3) Test	U	
(4) Flight Data	U	
(5) Navigation Display Unit	U	Applies to FB-111
(6) Computer Control Unit	U	Applies to FB-111
d. Maintenance Control Unit	U	

SECTION XXXII

AN/ALQ-41, COUNTERMEASURE SET

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Accuracy (Precision)	C(3)	
2. Altitude	C(3)	
3. Design Information	C(3)	Applies to overall design and to those design characteristics identified as sensitive in other paragraphs of this section.
4. System capacity	C(3)	Applies to information which relates to maximum number of operations
5. Range (maximum/minimum)	C(3)	
6. Reliability	C(3)	
7. Signature characteristics:		
a. Frequency bandwidth	C(3)	
b. Sensitivity	C(3)	
c. Specific frequency	C(3)	
d. Output	C(3)	
e. Modulation	S(3)	
8. Vulnerability to countermeasures	S(3)	

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SECTION XXXII (Cont'd)

AN/ALQ-41, COUNTERMEASURE SET

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
9. End item hardware:		
AN/ALQ-41	C(3)	External views of RF-631/ALQ-41, T-846/ALQ-41 and PP-3067/ALQ-41 which reveal nomenclature plate are Confidential (GP-3). All other views are Unclassified.
RT-631/ALQ-41, Receiver Transmitter	C(3)	
T-846/ALQ-41, Transmitter	C(3)	
PP-3067/ALQ-41, Power Supply	C(3)	
MT-2580/ALQ-41, Mounting Base	U	
C-3780/ALQ-41, Control	U	

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SECTION XXXIII

QRC-160-8(T) POD

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Accuracy	C(3)	
2. Altitude	U	
3. Design information	C-S(3)	Design information is Confidential (GP-3) if it does not relate to pod purpose or operational effectiveness. The latter is Secret (GP-3). Design information derived from the threat is Secret (GP-3).
4. Tuning range	C(3)	
5. Resolution	C(3)	
6. Reliability	U	Unless degraded performance as an operational deficiency is revealed in which case a Secret (GP-3) will apply.
7. Flight test results	C(3)	Unidentified raw flight test data are Unclassified.
8. End Item:		
QRC-160-8(T) Pod	C(3)	External views of the pod are Unclassified.
Components:		
Receiver/Programmer/Transmitter	C(3)	
Antenna	U	
Control-Indicator	U	
Generator	U	

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SECTION XXXIV

AN/ALR-39 AND/OR AN/ALR-41 RECEIVING SET, COUNTERMEASURES

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Accuracy	C(3)	Applies to frequency and resolution accuracy
2. Design information	C(3)	Applies to design information which relates to the Confidential characteristics identified in other items in this section
3. Resolution	C(3)	
4. Signature characteristics	C(3)	Applies to such aspects as frequency range, sensitivity, etc.
5. Operational performance characteristics/limitations	S(3)	
6. Reliability	U	Unclassified unless it relates to degraded performance as an operational deficiency in which case a Secret (Gp-3) classification applies.
7. Hardware is classified as follows:		
a. AN/ALR-39 Receiving Set, Countermeasures	C(3)	External views are Unclassified unless frequency range or other signature characteristics are revealed in which case a Confidential (Gp-3) classification applies.
R-1607/ALR-39, Receiver, Countermeasures	C(3)	
C-1733/ALR-31, Control, Indicator	C(3)	

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SECTION XXXIV (Cont'd)

AN/ALR-39 AND/OR AN/ALR-41 RECEIVING SET, COUNTERMEASURES

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
MX-8317/ALR-39, Data Analysis Unit	C(3)	
AS-2070/ALR-31, Antenna	C(3)	
b. AN/ALR-41 Receiving Set Countermeasures	C(3)	External views are Unclassified unless frequency range or other signature characteristics are revealed in which case a Confidential (Gp-3) classification applies.
R-1633/ALR-41, Receiver, Data Analysis Unit	C(3)	
R-1632/ALR-41, Receiver, Countermeasures	C(3)	
AS-2436/ALR-41, Antenna	U	
CU-1913/ALR-41, Divider, Power Radio Frequency	U	

NOTE: All other components of AN/ALR-39 and/or AN/ALR-41 are
Unclassified including Training Mission Group (Frequency
Adapter Kits).

SECTION XXXV

AN/ASQ-115, DATA DISPLAY SET

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Accuracy	U	
2. Pulse recurrence frequency	U	
3. Range coverage	U	
4. Vulnerability to ECM	C(3)	
5. Weather capability	U	
6. Modes of operation	U	
7. Velocity/height ratio	U	
8. The AN/ASQ-115 and components thereof as end item hardware are Unclassified.		

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SECTION XXXVI

AN/APD-() AIRBORNE RADAR RECONNAISSANCE SET
(Modified AN/APQ-102 Radar Mapping Set)

<u>Information Revealing</u>	<u>Class and Gp Code</u>	<u>Remarks</u>
1. Design/Performance Characteristics:		
a. Accuracy	C(3)	
b. Altitude (maximum/minimum)	C(3)	
c. Counter Countermeasures Capability	S(3)	
d. Range (maximum detection)	C(3)	
e. Resolution	C(3)	Applies to azimuth and geometric fidelity
f. Signature characteristics	C(3)	Applies to numerical frequency bandwidth, pulse width, and specific operating frequency
g. Radar Map Film	U	Unclassified unless it relates to sensitive characteristics of equipment
2. Hardware:		
AN/APD-()	C(3)	External views are Unclassified unless classified signature characteristics are revealed in which case a Confidential (Gp-3) classification applies
Components:		
Amplifier Modulator	C(3)	All other component hardware is Unclassified
Frequency Converter Transmitter	C(3)	
Computer-Reference Signal Generator	C(3)	

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SECTION XXXVII

AEROSPACE GROUND EQUIPMENT (AGE)

Aerospace Ground Equipment is Unclassified unless it reveals classified information concerning the airborne system or systems it supports.

The following AGE has been determined to be classified as indicated:

1. P/N 12A6811-1, AGERD 6811, Penetration Aids Test Station (General Dynamics/Electronics) classified Confidential (Gp-3) with any of the following TRU's installed:

All460	Radar Modulation Simulator Test Control Panel	CONFIDENTIAL UNCLASSIFIED (External views of face is Confidential (Gp-3) when testing)
--------	--	--

2. P/N 12A6812 (FSN 4920-794-7490EW), AGERD 6812, IR Test Station (GDE) is classified Confidential (Gp-3) only when the following component is installed as a part of the IR Target Source and components/subassemblies thereof:

Filter Wheel (Barnes Part Number 367401-2036) - CONFIDENTIAL (Gp-3)

3. P/N 12A6815-1 (FSN 4920-794-7612), AGERD 6815, Video Test Station (General Dynamics/Electronics/Rochester), hardware is UNCLASSIFIED. Classified information revealed only through access to tapes and manuals used in testing certain LRU's with the AGERD.

4. FSN 4935-073-580AK AGERD 7884 (Martin P/N 293BA 700000-009)	TS-2022/DRM-23, Test Set Command Link (Flight Line) (Martin/Orlando)	CONFIDENTIAL (3) (with or without crystals)
---	--	---

5. AN/ASM-98B Data Link Test Set, AGERD 7763 (RCA P/N 8351785-502) is classified CONFIDENTIAL (3). External view is CONFIDENTIAL (3) if any of the following information regarding the AN/ASW-21 Digital Data Communications Set is revealed (otherwise UNCLASSIFIED):

- a. Message structure
- b. Message coding - special (messages 1 through 4, 9 through 16, or 18 through 22)
- c. Design data relating to anti-jam features

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SECTION XXXVII (Cont'd)

AEROSPACE GROUND EQUIPMENT (AGE)

6. P/N 12A6842-1 (FSN 4920-925-5021 EW), AGERD 6842, IR Test Station (GDE) is classified Confidential (Gp-3) only when the following component is installed as a part of the IR Target Source and components/subassemblies thereof:

Filter Wheel (Barnes Part Number 367401-2036) - CONFIDENTIAL (Gp-3)

7. AGERD 6608, Flight Line Tester Pen Aids, which includes component parts, Low Band High Power Test Simulator (P/N 31-014824-01), Medium Band High Power Test Simulator (P/N 31-014825-01) and High Band High Power Test Simulator (P/N 31-014826-01) as end item hardware equipments are Unclassified.

8. P/N 12A06811, AGERD 96811, Pen Aids Test Station (GDE) is classified Confidential (Gp-3) with the following component installed:

Radar Modulation Simulator (P/N A37325-001) - Confidential (Gp-3).
External views are Unclassified.

9. AGERD 6636.2 Adapter, Focusing Kit (AVCO), classified Confidential (Gp-3) with the following installed:

AVCO P/N 186220 or 188767, DEWAR - Confidential (Gp-3)

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SECTION XXXVIII

MISSION SIMULATORS

1. Mission Simulators for the F-111A/D/E/F and FB-111A are identified as follows:

AF37A-T31 - F-111A Mission Simulator
 AF37A-T35 - F-111D Mission Simulator
 AF37A-T36 - FB-111A Mission Simulator
 AF37A-T41 - F-111E Mission Simulator
 AF37A-T() - F-111F Mission Simulator
 AN/ASQ-T6 - FB-111A Bomb/Navigation Simulator

2. Individual systems or components of F-111 Mission Simulators will be classified in accordance with information revealed pertaining to F-111 system/subsystems as specified in other sections of this guide. End item simulator hardware are classified as follows:

a. Student Station	C (3)	When the simulator is operational, the composite end item simulator is Secret (Gp-3).
b. Instructors Station (Displays)	C (3)	Applies only when AN/APS-109 is installed.
c. Radar Landmass System (Optics Cabinet)	U	Except when RLMS plates bearing a Confidential or higher classification are installed in which case the optics cabinet will be classified to the level of the plate installed.
d. Computer	U	Computer programming data including documentation and software will also be Unclassified unless they reveal sensitive aircraft/subsystem performance characteristics identified in other sections of this guide. The latter will be classified consistent with indicated security classification guidance.

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SECTION XXXVIII (Cont'd)

MISSION SIMULATORS

- | | | |
|---|---|--|
| e. Computer Peripheral
Equipment and AGE | U | |
| f. Photographs | U | . Photographs of displays including views of simulated attach radar scope displays are Unclassified. Photographs of interior of optics cabinet with plate installed are Confidential (Gp-3). Photographs of displays which reveal scope reticle markings of frequency band limits of AN/APS-109 are Confidential (Gp-3). |

SECTION XXXIX

TRAINERS

Trainers are unclassified unless they reveal classified information about the airborne equipment to which they are related. MTS trainers that have classified hardware installed will be classified consistent with that established for the applicable subsystem as indicated in other sections of this guide.

SECTION XL

NUCLEAR WEAPONS/WARHEADS

1. The security classification of nuclear weapons/warhead information pertaining to armament or other systems used with F/RF/FB-111 series aircraft will be classified in accordance with Secret-Restricted Data Air Force Security Classification Guide for Nuclear Weapons/Warheads, May 1968, as revised. A copy of this guidance has been furnished to General Dynamics, Fort Worth, Texas.
2. Guidance for the MK-69 Warhead, AGM-69A, will be in accordance with Secret-Restricted Data (CNWDI) Security Classification Guide AGM-69A (WS0140A), Part II, MK-69 Warhead, October 1969, as revised. Copies of this guide have been furnished to General Dynamics, Fort Worth, Texas.
3. The association of MK number weapons such as MK-28, MK-43, etc., with their related dummy weapon by BDU number or other such identification is Unclassified.

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SECTION XLI

CONTRACTOR FURNISHED EQUIPMENT (CFE)

(Other than that listed in separate previous Sections)

Contractor Furnished Equipment which are Unclassified include, but are not limited to, the following:

Air Data Computer
 Refrigeration Package and Control Set
 Low Altitude Radio Altimeter
 Optical Sight and Missile Launch Computer
 AC Generating System
 HF Antenna Coupler Group
 HF Radio Computer
 Flight Control System
 Inlet Control, Engine Air Induction
 Escape System
 Blanking Pulse Junction Box
 KS-56B Camera, Still Picture
 KS-87B Camera, Still Picture
 KA-90 Camera, Still Picture
 Voice Recorder (for RF-111A)
 LS-68, Flasher Set (Altitude capability is Confidential (Gp-3))
 Bearing Distance Heading Indicator
 Indicator, Radar Altitude
 Position Indicator
 Indicator, True Air Speed
 Surface Position Indicator Set
 Fuel Measuring Set
 Starter Set
 Emergency Generator Set
 Stand-by Compass
 Skid Control Set
 Temperature Control Set
 Slat Drive Set
 Flap Drive Set
 Cabin Pressurization Set
 Cooling Control Set
 Transponder, SST-183X (for FB-111)
 AN/ASG-25, Sight Set, Optical Lead Computing (FB-111)

While the above equipment, as well as others not listed, are Unclassified, in some instances subcontractor personnel will require access to classified information on other systems or to classified aircraft information, in order to perform on the subcontracts.

SECTION XLII

RF/F-111C PROGRAM

1. Equipment and information common to F-111A/D/E/F, RF-111A, and FB-111A will be classified in accordance with other sections of this guide.
2. There is not any peculiar RF/F-111C equipment.

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SECTION XLIII

SYSTEM DEVELOPMENT TESTING

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Specific test objectives	U-S	Classify in accordance with design and performance information of the aircraft, weapons, or systems which are revealed as noted in other Sections of this guide.
2. Flight test schedules	U	
3. Test data, analyses and conclusions resulting therefrom	U-S	See Remark for Item 1 above.
4. Details of range equipment, provided classified aspects of weapons system are not revealed	U	
5. Status of test planning	U	

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SECTION XLIV

OPERATIONAL DATA

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Operational capability data (equipment dates, readiness dates, operational employment dates, etc.)	U-C(4)	A Confidential (Gp-4) classification will apply to planned IOC dates for newly activated operational units. After IOC date is reached such information becomes Unclassified. See Item 2 below for guidance relating to transition of units.
2. Transition of Individual Units	S(4)	Information which reveals the identity, location and/or effective date of operational units scheduled for transition to F/RF/FB-111 type/model aircraft will be classified Secret (Gp-4) until officially released by Hq USAF or until six months before the effective transition date at which time it becomes Unclassified.
3. Force structure	U-C(4)	Planned force structure will be classified Confidential (Gp-4) until such information is officially released by Hq USAF at which time it becomes Unclassified. Manpower/personnel requirements for current and/or officially approved or released operational force structure is Unclassified.
4. Location of individual operational squadrons		
a. Prior to official DOD release	C(4)	Applies to initial planned locations within ZI. Plans for overseas deployment locations may be classified Secret if considered appropriate by using command. See Item 2 above for guidance relating to transition of units.
b. After official DOD release	U	

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SECTION XLV

QRC-335A-3 AND -4 ECM PODS

<u>Information Revealing</u>	<u>Class. and Gp Code</u>	<u>Remarks</u>
1. Design information	C(3)	Applies to design aspects of the pod which reveal its operational characteristics. Design information which discloses the threat characteristics is Secret (Gp-3).
2. Resolution	C(3)	
3. Signature characteristics:		
a. Frequency	C(3)	
b. Signal separation	C(3)	
c. Modulation techniques	C(3)	
d. RF Power parameters	C(3)	
4. Operational performance characteristics/limitations	C(3)	
5. Vulnerability to ECM	C(3)	
6. End item hardware:		
a. QRC-335A-3 and -4 ECM Pods	C(3)	External views are Unclassified unless classified signature characteristics are revealed in which case the classifications indicated in paragraph 3 above apply.

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SECTION XLVI

QRC 431/465 - AN/APQ-134 FIX #1 AND FIX #2

<u>Information Revealing</u>	<u>Class and Gp Code</u>	<u>Remarks</u>
1. Accuracy	C (3)	
2. Design Information	C (3)	Applies to design information of the fixes other than vulnerability details which are Secret (Gp-3)
3. Countercountermeasures Capability	C (3)	
4. Range	C (3)	
5. Resolution	C (3)	
6. Signature characteristics	C (3)	
7. System Capacity	C (3)	
8. Vulnerability to Countermeasures	S (3)	
9. Hardware:		
a. Fix #1:		External views are Unclassified unless signature characteristics are revealed or disclosed. The latter are Confidential (Gp-3).
(1) Antenna/Receiver (P/N 582355)	C (3)	
(2) Transmitter/Synchronizer (P/N 582358)	C (3)	
b. Fix #2:		External views are Unclassified unless signature characteristics are revealed or disclosed. The latter are Confidential (Gp-3).
(1) Independent LRU (P/N AL 913M001)	C (3)	

NOTE: See Section XII of this guide for security classification of other aspects of AN/APQ-134 Terrain Following Radar

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SECTION XLVII

AGM-62A, WALLEYE GUIDED WEAPON

<u>Information Revealing</u>	<u>Class and Gp Code</u>	<u>Remarks</u>
1. Assembled Weapon:		
a. Accuracy (Includes miss distance and CEP)	C(3)	
b. Altitude (Maximum/minimum)	C(3)	
c. Range (Maximum/minimum)	C(3)	
d. Velocity (Maximum/launching)	C(3)	
e. Maneuverability	C(4)	
f. Countercountermeasures capability (proven or theoretical)	S(3)	
g. Vulnerability to countermeasures	S(3)	
h. Vulnerability to environment	C(3)	
i. Reliability	C(4)	
j. Sensitivity	C(4)	
k. Resolution	C(4)	
l. System capacity	C(4)	
m. Terminal ballistics	C(4)	
n. Lethality	C(4)	
o. End item	C(4)	
2. Guidance System:		
a. Accuracy (Includes miss distance and CEP)	C(3)	
b. Altitude (Maximum/minimum)	C(3)	
c. Range (Maximum/minimum)	C(3)	
d. Countercountermeasures capability (Proven or theoretical)	S(3)	
e. Vulnerability to countermeasures	S(3)	
f. Vulnerability to environment	C(3)	
g. Reliability	C(4)	
h. Sensitivity	C(4)	

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SECTION XLVII

AGM-62A, WALLEYE GUIDED WEAPON

<u>Information Revealing</u>	<u>Class and Gp Code</u>	<u>Remarks</u>
i. Resolution	C(4)	
j. System capacity	C(4)	
k. End item	C(4)	
3. Warhead:		
a. Design	C(3)	
b. Lethality	C(4)	
c. Terminal Ballistics	C(4)	
d. Reliability	C(4)	
e. End item	C(4)	
4. Fuze (MK 328, Mod 0):		
a. Design	C(3)	Explosive train, housing, shelf life, sensing element and physical configuration are Unclassified
b. Performance characteristics	C(3)	
c. Reliability	C(3)	
d. Electromagnetic radiation susceptability	C(3)	
e. Nuclear radiation susceptability	C(3)	
f. Capabilities/limitations	C(3)	
g. External view	U	
h. End item	C(4)	Components that make the fuze configuration are Unclassified until assembled.
5. Test Sets:		
a. AN/DSM-74	U	
b. AN/DSM-77	U	
c. AN/ASM-184	U	

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SECTION XLVIII

DISTRIBUTION

Hq USAF/SDCS	3	Hq AFSC/SD	1
Wash DC 20330		Andrews AFB	
		Wash DC 20331	
Hq USAF/IGSPB	3	Hq USAF/XOP	1
Wash DC 20330		Wash DC 20330	
Deputy TIG USAF/IGDE	1	Det #1	5
Norton AFB CA 92409		831 Air Division/TACD	
		Edwards AFB CA 93523	
Hq USAF/OARG	1		
Wash DC 20330		Tech Ing Gen/TSDF	1
		Sheppard AFB, Texas 76311	
Hq AFSC/IGSA	1		
Andrews AFB		SAAMA/SP	1
Wash DC 20331		Kelly AFB TX 78241	
General Dynamics (Industrial)	50		
Security Office		ADTC/TGT	1
PO Box 748		Eglin AFB FL 32542	
Fort Worth TX 76101			
Hughes Aircraft Co	5	2854 AB Gp/SP	1
Florence & Teale Sts		Tinker AFB OK 73145	
Culver City CA 90230			
		ATC/TTAF	1
AFPRO General Dynamics	5	Randolph AFB TX 78148	
PO Box 371			
Fort Worth TX 76101		Chanute TTC/XPL-S	1
		Chanute AFB IL 61866	
Naval Air Systems Command	3		
(CD-3)		Keesler TTC/XPPP	1
Wash DC 20360		Keesler AFB MS 39534	
6510 AB Gp/SP	1	Hq SAC/IGSA	2
Edwards AFB CA 93523		Oddutt AFB NB 68113	
6512 TG/TX	1	Hq TAC/IGSP	12
Edwards AFB CA 93523		Langley AFB VA 23365	
SMAMA/SP	3	OL 3, European Security	1
McClellan AFB CA 95652		Region	
		APO New York NY 09633	
OOAMA/SP	1		
Hill AFB UT 84401		Directorate of Nuclear	1
		Safety/AFINSE2	
Secretary of AF/SAFOIS	1	Kirtland AFB NM 87117	
Wash DC 20330			
		ASD/ATA	1
		W-PAFB OH 45433	

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DISTRIBUTION

Lowry TTC/XPLS	1	3201 SPS/SP	1
Lowry AFB CO 80230		Eglin AFB FL 32542	
Sheppard TTC/TSOP-S	1	3246 TW/TG	1
Sheppard AFB TX 76311		Eglin AFB FL 32542	
Commander FTD 523 Sq	1	474 TAC Fighter Wg/TFOM	1
Nellis AFB NV 89110		Nellis AFB VA 89110	
Commander FTD 562 Sq	1	3750 Tech School/TSOR/21	1
Cannon AFB NM 88101		Sheppard AFB TX 76311	
Commander FTD/916S	1	Commander FTD/210S	1
APO New York 09194		Plattaburg NY 12903	
ASD/FTI	10	15 AF/DPL	1
W-PAFB OH 45433		March AFB CA 92508	
ASD/YBO	100	AFWL/XP	1
W-PAFB OH 45433		Kirtland AFB NM 87117	
Hq AFLC/IGSP	1	Hq USAF Tactical Fighter	2
W-PAFB OH 45433		Weapons Center/CDI	
		Nellis AFB NV 89110	
ASD/YG	3	Hq Third AF/DS	1
W-PAFB OH 45433		APO New York 09125	
NASCR Pacific	2	OOAMA/OONMP-B	10
US Naval Air Station		Hill AFB UT 84401	
North Island			
San Diego CA 92135		20 TAC Ftr Wg	5
ASD/PPDFS	1	APO New York 09194	
W-PAFB OH 45433		AFMDC/SP	3
7 Cmbt Spt Gp/CSP		Holloman AFB NM 88330	
Carswell AFB TX 76127		OOAMA/DOBPE	1
SAC/DPLCI	10	Hill AFB UT 84401	
Offutt AFB NE 68113		AGMC/ABABA	1
2 AF/DPL	5	Newark AFS	
Barksdale AFB LA 71110		Newark OH 43055	

Security Classification Guide
F/R/FB-111 Programs

March 1971

SECTION XLVIII (Cont'd)

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ASD/FTO WPAFB, Ohio 45433	1		

SECRECY IN GOVERNMENT

PART 2—SECURITY AGREEMENTS

SECURITY BRIEFING AND TERMINATION STATEMENTS (INDUSTRIAL PERSONNEL)

Section 1001 of Title 18, United States Code, makes it a criminal offense, punishable by a maximum of five (5) years imprisonment, \$10,000 fine, or both, knowingly and willfully to make a false statement or representation to any Department or Agency of the United States, as to any matter within the jurisdiction of any Department or Agency of the United States.

INSTRUCTION: Part I of this form shall be executed by an employee of a contractor following his initial security briefing, and prior to being permitted access to classified information. An employee who executes Part I and who subsequently is absent from place of employment, for any reason, for more than one year, must reexecute a new Part I before again being permitted access to classified information.

Part II shall be executed by the employee:

- at the time of termination of employment (discharge, resignation, or retirement)
- at the beginning of a layoff or leave of absence for an indefinite period, or a prescribed period in excess of one year.
- if the employee's personnel security clearance is administratively terminated
- if the employee's personnel security clearance is suspended or revoked by the Department of Defense.
- upon termination of the facility's security clearance.

If the employee refuses to sign either part of this form, the contractor shall notify his cognizant security office immediately.

TYPED NAME OF EMPLOYEE (Last, First, Middle)

TYPED NAME OF CONTRACTOR

PART I - INITIAL SECURITY BRIEFING STATEMENT

DATE OF BRIEFING

TYPED NAME AND TITLE OF PERSON BRIEFING EMPLOYEE

I hereby certify that I have received a security briefing. I shall not knowingly and willfully communicate, deliver, or transmit, in any manner, classified information to an unauthorized person or agency. I am informed that such improper disclosure may be punishable under Federal criminal statutes. I have been instructed in the importance of classified information, and in the procedure governing its safeguarding. I am informed that willful violation or disregard of security regulations may cause the loss of my security clearance. I have read, or have had read to me, the portions of the Espionage Laws and other Federal criminal statutes relating to the safeguarding of classified information reproduced in Appendix VI, "Department of Defense Industrial Security Manual." I will report to the Federal Bureau of Investigation and to my employer, without delay, any incident which I believe to constitute an attempt to solicit classified information by an unauthorized person.

TYPED NAME AND SIGNATURE OF WITNESS

DATE SIGNED

SIGNATURE OF EMPLOYEE

PART II - SECURITY TERMINATION STATEMENT

I certify that I have read, or have had read to me, the portions of the Espionage Laws and other Federal criminal statutes applicable to the safeguarding of classified information reproduced in Appendix VI, "Department of Defense Industrial Security Manual"; that I have surrendered all classified information in my custody; that I will not knowingly and willfully communicate, deliver or transmit, in any manner, classified information to an unauthorized person or agency; that I will report to the Federal Bureau of Investigation, without delay, any incident which I believe to constitute an attempt to solicit classified information by an unauthorized person; and that I (have) (have not) (~~strike out inappropriate word or words~~) also received a terminal, oral security briefing.

TYPED NAME AND SIGNATURE OF WITNESS

DATE SIGNED

SIGNATURE OF EMPLOYEE

SECRECY IN GOVERNMENT

PART 3—CLASSIFICATION OF INFORMATION

[From the Federal Register, Vol. 37, No. 4, Mar. 10, 1972]

TITLE 3—THE PRESIDENT

EXECUTIVE ORDER 11652

Classification and Declassification of National Security Information and Material

The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch.

Within the Federal Government there is some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our allies. To protect against actions hostile to the United States, of both an overt and covert nature, it is essential that such official information and material be given only limited dissemination.

This official information or material, referred to as classified information or material in this order, is expressly exempted from public disclosure by Section 552(b) (1) of Title 5, United States Code. Wrongful disclosure of such information or material is recognized in the Federal Criminal Code as providing a basis for prosecution.

To ensure that such information and material is protected, but only to the extent and for such period as is necessary, this order identifies the information to be protected, prescribes classification, downgrading, declassification and safeguarding procedures to be followed, and establishes a monitoring system to ensure its effectiveness.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, it is hereby ordered:

SECTION 1. *Security Classification Categories.* Official information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States (hereinafter collectively termed "national security") shall be classified in one of three categories, namely "Top Secret," "Secret," or "Confidential," depending upon the degree of its significance to national security. No other categories shall be used to identify official information or material as requiring protection in the interest of national security, except as otherwise expressly provided by statute. These classification categories are defined as follows:

(A) "*Top Secret.*" "Top Secret" refers to that national security information or material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint.

(B) "*Secret*," "*Secret*" refers to that national security information or material which requires a substantial degree of protection. The test for assigning "*Secret*" classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security. Examples of "serious damage" include disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security. The classification "*Secret*" shall be sparingly used.

(C) "*Confidential*," "*Confidential*" refers to that national security information or material which requires protection. The test for assigning "*Confidential*" classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security.

SEC. 2. *Authority to Classify*. The authority to originally classify information or material under this order shall be restricted solely to those offices within the executive branch which are concerned with matters of national security, and shall be limited to the minimum number absolutely required for efficient administration. Except as the context may otherwise indicate, the term "Department" as used in this order shall include agency or other governmental unit.

(A) The authority to originally classify information or material under this order as "*Top Secret*" shall be exercised only by such officials as the President may designate in writing and by:

- (1) The heads of the Departments listed below;
- (2) Such of their senior principal deputies and assistants as the heads of such Departments may designate in writing; and
- (3) Such heads and senior principal deputies and assistants of major elements of such Departments, as the heads of such Departments may designate in writing.

Such offices in the Executive Office of the President as the President may designate in writing

Central Intelligence Agency
Atomic Energy Commission
Department of State
Department of the Treasury
Department of Defense
Department of the Army
Department of the Navy
Department of the Air Force
United States Arms Control and Disarmament Agency
Department of Justice
National Aeronautics and Space Administration
Agency for International Development

(B) The authority to originally classify information or material under this order as "*Secret*" shall be exercised only by:

- (1) Officials who have "*Top Secret*" classification authority;
- (2) Such subordinates as officials with "*Top Secret*" classification authority under (A) (1) and (2) above may designate in writing; and
- (3) The heads of the following named Departments and such senior principal deputies or assistants as they may designate in writing.

Department of Transportation
Federal Communications Commission
Export-Import Bank of the United States
Department of Commerce
United States Civil Service Commission
United States Information Agency
General Services Administration
Department of Health, Education, and Welfare
Civil Aeronautics Board
Federal Maritime Commission
Federal Power Commission
National Science Foundation
Overseas Private Investment Corporation

(C) The authority to originally classify information or material under this order as "*Confidential*" may be exercised by officials who have "*Top Secret*" or "*Secret*" classification authority and such officials as they may designate in writing.

(D) Any Department not referred to herein and any Department or unit established hereafter shall not have authority to originally classify information or material under this order, unless specifically authorized hereafter by an Executive order.

Sec. 3. *Authority to Downgrade and Declassify.* The authority to downgrade and declassify national security information or material shall be exercised as follows:

(A) Information or material may be downgraded or declassified by the official authorizing the original declassification, by a successor in capacity or by a supervisory official of either.

(B) Downgrading and declassification authority may also be exercised by an official specifically authorized under regulations issued by the head of the Department listed in Section 2 (A) or (B) hereof.

(C) In the case of classified information or material officially transferred by or pursuant to statute or Executive order in conjunction with a transfer of function and not merely for storage purposes, the receiving Department shall be deemed to be the originating Department for all purposes under this order including downgrading and declassification.

(D) In the case of classified information or material not officially transferred within (C) above, but originated in a Department which has since ceased to exist, each Department in possession shall be deemed to be the originating Department for all purposes under this order. Such information or material may be downgraded and declassified by the Department in possession after consulting with any other Departments having an interest in the subject matter.

(E) Classified information or material transferred to the General Services Administration for accession into the Archives of the United States shall be downgraded and declassified by the Archivist of the United States in accordance with this order, directives of the President issued through the National Security Council and pertinent regulations of the Departments.

(F) Classified information or material with special markings, as described in Section 8, shall be downgraded and declassified as required by law and governing regulations.

Sec. 4. *Classification.* Each person possessing classifying authority shall be held accountable for the propriety of the classifications attributed to him. Both unnecessary classification and over-classification shall be avoided. Classification shall be solely on the basis of national security considerations. In no case shall information be classified in order to conceal inefficiency or administrative error, to prevent embarrassment to a person or Department, to restrain competition or independent initiative or to prevent for any other reason the release of information which does not require protection in the interest of national security. The following rules shall apply to classification of information under this order:

(A) *Documents in General.* Each classified document shall show on its face its classification and whether it is subject to or exempt from the General Declassification Schedule. It shall also show the office of origin, the date of preparation and classification and, to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use. Material containing references to classified materials, which references do not reveal classified information, shall not be classified.

(B) *Identification of Classifying Authority.* Unless the Department involved shall have provided some other method of identifying the individual at the highest level that authorized classification in each case, material classified under this order shall indicate on its face the identity of the highest authority authorizing the classification. Where the individual who signs or otherwise authenticates a document or item has also authorized the classification, no further annotation as to his identity is required.

(C) *Information or Material Furnished by a Foreign Government or International Organization.* Classified information or material furnished to the United States by a foreign government or international organization shall either retain its original classification or be assigned a United States classification. In either case, the classification shall assure a degree of protection equivalent to that required by the government or international organization which furnished the information or material.

(D) *Classification Responsibilities.*—A holder of classified information or material shall observe and respect the classification assigned by the originator. If a

holder believes that there is unnecessary classification, that the assigned classification is improper, or that the document is subject to declassification under this order, he shall so inform the originator who shall thereupon re-examine the classification.

SEC. 5. Declassification and Downgrading. Classified information and material, unless declassified earlier by the original classifying authority, shall be declassified and downgraded in accordance with the following rules:

(A) *General Declassification Schedule.* (1) "*Top Secret.*" Information or material originally classified "*Top Secret*" shall become automatically downgraded to "*Secret*" at the end of the second full calendar year following the year in which it was originated, downgraded to "*Confidential*" at the end of the fourth full calendar year following the year in which it was originated, and declassified at the end of the tenth full calendar year following the year in which it was originated.

(2) "*Secret.*" Information and material originally classified "*Secret*" shall become automatically downgraded to "*Confidential*" at the end of the second full calendar year following the year in which it was originated, and declassified at the end of the eighth full calendar year following the year in which it was originated.

(3) "*Confidential.*" Information and material originally classified "*Confidential*" shall become automatically declassified at the end of the sixth full calendar year following the year in which it was originated.

(B) *Exemptions from General Declassification Schedule.* Certain classified information or material may warrant some degree of protection for a period exceeding that provided in the General Declassification Schedule. An official authorized to originally classify information or material "*Top Secret*" may exempt from the General Declassification Schedule any level of classified information or material originated by him or under his supervision if it falls within one of the categories described below. In each case such official shall specify in writing on the material the exemption category being claimed and, unless impossible, a date or event for automatic declassification. The use of the exemption authority shall be kept to the absolute minimum consistent with national security requirements and shall be restricted to the following categories:

(1) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.

(2) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources or methods.

(3) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security.

(4) Classified information or material the disclosure of which would place a person in immediate jeopardy.

(C) *Mandatory Review of Exempted Material.* All classified information and material originated after the effective date of this order which is exempted under (B) above from the General Declassification Schedule shall be subject to a classification review by the originating Department at any time after the expiration of ten years from the date of origin provided:

(1) A Department or member of the public requests a review;

(2) The request describes the record with sufficient particularity to enable the Department to identify it; and

(3) The record can be obtained with only a reasonable amount of effort.

Information or material which no longer qualifies for exemption under (B) above shall be declassified. Information or material continuing to qualify under (B) shall be so marked and, unless impossible, a date for automatic declassification shall be set.

(D) *Applicability of the General Declassification Schedule to Previously Classified Material.* Information or material classified before the effective date of this order and which is assigned to Group 4 under Executive Order No. 10501, as amended by Executive Order No. 10964, shall be subject to the General Declassification Schedule. All other information or material classified before the effective date of this order, whether or not assigned to Groups 1, 2, or 3 of Executive Order No. 10501, as amended, shall be excluded from the General Declassification Schedule. However, at any time after the expiration of ten years from the date of origin it shall be subject to a mandatory classification review and disposition under the same conditions and criteria that apply to classified information and

material created after the effective date of this order as set forth in (B) and (C) above.

(E) *Declassification of Classified Information or Material After Thirty Years.* All classified information or material which is thirty years old or more, whether originating before or after the effective date of this order, shall be declassified under the following conditions:

(1) All information and material classified after the effective date of this order shall, whether or not declassification has been requested, become automatically declassified at the end of thirty full calendar years after the date of its original classification except for such specifically identified information or material which the head of the originating Department personally determines in writing at that time to require continued protection because such continued protection is essential to the national security or disclosure would place a person in immediate jeopardy. In such case, the head of the Department shall also specify the period of continued classification.

(2) All information and material classified before the effective date of this order and more than thirty years old shall be systematically reviewed for declassification by the Archivist of the United States by the end of the thirtieth full calendar year following the year in which it was originated. In his review, the Archivist will separate and keep protected only such information or material as is specifically identified by the head of the Department in accordance with (E) (1) above. In such case, the head of the Department shall also specify the period of continued classification.

(F) *Departments Which Do Not Have Authority For Original Classification.* The provisions of this section relating to the declassification of national security information or material shall apply to Departments which, under the terms of this order, do not have current authority to originally classify information or material, but which formerly had such authority under previous Executive orders.

Sec. 6. *Policy Directives on Access, Marking, Safekeeping, Accountability, Transmission, Disposition and Destruction of Classified Information and Material.* The President acting through the National Security Council shall issue directives which shall be binding on all Departments to protect classified information from loss or compromise. Such directives shall conform to the following policies:

(A) No person shall be given access to classified information or material unless such person has been determined to be trustworthy and unless access to such information is necessary for the performance of his duties.

(B) All classified information and material shall be appropriately and conspicuously marked to put all persons on clear notice of its classified contents.

(C) Classified information and material shall be used, possessed, and stored only under conditions which will prevent access by unauthorized persons or dissemination to unauthorized persons.

(D) All classified information and material disseminated outside the executive branch under Executive Order No. 10865 or otherwise shall be properly protected.

(E) Appropriate accountability records for classified information shall be established and maintained and such information and material shall be protected adequately during all transmissions.

(F) Classified information and material no longer needed in current working files or for reference or record purposes shall be destroyed or disposed of in accordance with the records disposal provisions contained in Chapter 33 of Title 44 of the United States Code and other applicable statutes.

(G) Classified information or material shall be reviewed on a systematic basis for the purpose of accomplishing downgrading, declassification, transfer, retirement and destruction at the earliest practicable date.

Sec. 7. *Implementation and Review Responsibilities.* (A) The National Security Council shall monitor the implementation of this order. To assist the National Security Council, an Interagency Classification Review Committee shall be established, composed of representatives of the Departments of State, Defense and Justice, the Atomic Energy Commission, the Central Intelligence Agency and the National Security Council Staff and a Chairman designated by the President. Representatives of other Departments in the executive branch may be invited to meet with the Committee on matters of particular interest to those Departments. This Committee shall meet regularly and on a continuing basis shall review and take action to ensure compliance with this order, and in particular:

(1) The Committee shall oversee Department actions to ensure compliance with the provisions of this order and implementing directives issued by the President through the National Security Council.

(2) The Committee shall, subject to procedures to be established by it, receive, consider and take action on suggestions and complaints from persons within or without the government with respect to the administration of this order, and in consultation with the affected Department or Departments assure that appropriate action is taken on such suggestions and complaints.

(3) Upon request of the Committee Chairman, any Department shall furnish to the Committee any particular information or material needed by the Committee in carrying out its functions.

(B) To promote the basic purposes of this order, the head of each Department originating or handling classified information or material shall:

(1) Prior to the effective date of this order submit to the Interagency Classification Review Committee for approval a copy of the regulations it proposes to adopt pursuant to this order.

(2) Designate a senior member of his staff who shall ensure effective compliance with and implementation of this order and shall also chair a Departmental committee which shall have authority to act on all suggestions and complaints with respect to the Department's administration of this order.

(3) Undertake an initial program to familiarize the employees of his Department with the provisions of this order. He shall also establish and maintain active training and orientation programs for employees concerned with classified information or material. Such programs shall include, as a minimum, the briefing of new employees and periodic reorientation during employment to impress upon each individual his responsibility for exercising vigilance and care in complying with the provisions of this order. Additionally, upon termination of employment or contemplated temporary separation for a sixty-day period or more, employees shall be debriefed and each reminded of the provisions of the Criminal Code and other applicable provisions of law relating to penalties for unauthorized disclosure.

(C) The Attorney General, upon request of the head of a Department, his duly designated representative, or the Chairman of the above described Committee, shall personally or through authorized representatives of the Department of Justice render an interpretation of this order with respect to any question arising in the course of its administration.

Sec. 8. *Material Covered by the Atomic Energy Act.* Nothing in this order shall supersede any requirements made by or under the Atomic Energy Act of August 30, 1954, as amended. "Restricted Data," and material designated as "Formerly Restricted Data," shall be handled, protected, classified, downgraded and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and the regulations of the Atomic Energy Commission.

Sec. 9. *Special Departmental Arrangements.* The originating Department or other appropriate authority may impose, in conformity with the provisions of this order, special requirements with respect to access, distribution and protection of classified information and material, including those which presently relate to communications intelligence, intelligence sources and methods and cryptography.

Sec. 10. *Exceptional Cases.* In an exceptional case when a person or Department not authorized to classify information originates information which is believed to require classification, such person or Department shall protect that information in the manner prescribed by this order. Such persons or Department shall transmit the information forthwith, under appropriate safeguards, to the Department having primary interest in the subject matter with a request that a determination be made as to classification.

Sec. 11. *Declassification of Presidential Papers.* The Archivist of the United States shall have authority to review and declassify information and material which has been classified by a President, his White House Staff or special committee or commission appointed by him and which the Archivist has in his custody at any archival depository, including a Presidential Library. Such declassification shall only be undertaken in accord with: (i) the terms of the donor's deed of gift, (ii) consultations with the Departments having a primary subject-matter interest, and (iii) the provisions of Section 5.

Sec. 12. *Historical Research and Access by Former Government Officials.* The requirement in Section 6(A) that access to classified information or material be granted only as is necessary for the performance of one's duties shall not apply to persons outside the executive branch who are engaged in historical research projects or who have previously occupied policy-making positions to which they were appointed by the President; *Provided*, however, that in each case the head of the originating Department shall:

(i) determine that access is clearly consistent with the interests of national security; and

(ii) take appropriate steps to assure that classified information or material is not published or otherwise compromised.

Access granted a person by reason of his having previously occupied a policy-making position shall be limited to those papers which the former official originated, reviewed, signed or received while in public office.

Sec. 13. *Administrative and Judicial Action.* (A) Any officer or employee of the United States who unnecessarily classifies or overclassifies information or material shall be notified that his actions are in violation of the terms of this order or of a directive of the President issued through the National Security Council. Repeated abuse of the classification process shall be grounds for an administrative reprimand. In any case where the Departmental committee or the Interagency Classification Review Committee finds that unnecessary classification or overclassification has occurred, it shall make a report to the head of the Department concerned in order that corrective steps may be taken.

(B) The head of each Department is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been responsible for any release or disclosure of national security information or material in a manner not authorized by or under this order or a directive of the President issued through the National Security Council. Where a violation of criminal statutes may be involved, Departments will refer any such case promptly to the Department of Justice.

Sec. 14. *Revocation of Executive Order No. 10501.* Executive Order No. 10501 of November 5, 1953, as amended by Executive Orders No. 10816 of May 8, 1959, No. 10901 of January 11, 1961, No. 10964 of September 20, 1961, No. 10985 of January 15, 1962, No. 11097 of March 6, 1963 and by Section 1(a) of No. 11382 of November 28, 1967, is superseded as of the effective date of this order.

Sec. 15. *Effective date.* This order shall become effective on June 1, 1972.

RICHARD NIXON,

THE WHITE HOUSE, March 8, 1972.

[From the Federal Register, Vol. 37, No. 98, May 19, 1972]

DIRECTIVE OF MAY 17, 1972—NATIONAL SECURITY COUNCIL DIRECTIVE GOVERNING THE CLASSIFICATION, DOWNGRADING, DECLASSIFICATION AND SAFEGUARDING OF NATIONAL SECURITY INFORMATION

The President has directed that Executive Order 11652, "Classification and Declassification of National Security Information and Material," approved March 8, 1972 (37 F.R. 5209, March 10, 1972) be implemented in accordance with the following:

I. AUTHORITY TO CLASSIFY

A. *Personal and Non-delegable.* Classification authority may be exercised only by those officials who are designated by, or in writing pursuant to, Section 2 of Executive Order 11652 (hereinafter the "Order"). Such officials may classify information or material only at the level authorized or below. This authority vests only to the official designated under the Order, and may not be delegated.

B. *Observance of Classification.* Whenever information or material classified by an official designated under A above is incorporated in another document or other material by any person other than the classifier, the previously assigned security classification category shall be reflected thereon together with the identity of the classifier.

C. *Identification of Classifier.* The person at the highest level authorizing the classification must be identified on the face of the information or material classified, unless the identity of such person might disclose sensitive intelligence information. In the latter instance the Department shall establish some other record by which the classifier can readily be identified.

D. *Record Requirement.* Each Department listed in Section 2(A) of the Order shall maintain a listing by name of the officials who have been designated in writing to have Top Secret classification authority. Each Department listed in Section 2 (A) and (B) of the Order shall also maintain separate listings by name of the persons designated in writing to have Secret authority and persons desig-

nated in writing to have Confidential authority. In cases where listing of the names of officials having classification authority might disclose sensitive intelligence information, the Department shall establish some other record by which such officials can readily be identified. The foregoing listings and records shall be compiled beginning July 1, 1972, and updated at least on a quarterly basis.

E. Resolution of Doubts. If the classifier has any substantial doubt as to which security classification category is appropriate, or as to whether the material should be classified at all, he should designate the less restrictive treatment.

II. DOWNGRADING AND DECLASSIFICATION

A. General Declassification Schedule and Exemptions. Classified information and material shall be declassified as soon as there are no longer any grounds for continued classification within the classification category definitions set forth in Section 1 of the Order. At the time of origination the classifier shall, whenever possible, clearly mark on the information or material specific date or event upon which downgrading or declassification shall occur. Such dates or events shall be as early as is permissible without causing damage to the national security as defined in Section 1 of the Order. Whenever earlier dates or events cannot be determined, the General Declassification Schedule set forth in Section 5(A) of the Order shall apply. If the information or material is exempted under Section 5(B) of the Order from the General Declassification Schedule, the classifier shall clearly mark the material to show that it is exempt and indicate the applicable exemption category. Unless impossible, the exempted information or material shall be assigned and clearly marked by the classifier with a specific date or event upon which declassification shall occur. Downgrading and declassification dates or events established in accordance with the foregoing, whether scheduled or non-scheduled, shall to the extent possible be carried forward and applied whenever the classified information or material is incorporated in other documents or material.

B. Extracts and Compilations. When classified information or material from more than one source is incorporated into a new document or other material, the document or other material shall be classified, downgraded or declassified in accordance with the provisions of the Order and Directives thereunder applicable to the information requiring the greatest protection.

C. Materially Not Officially Transferred. When a Department holding classified information or material under the circumstances described in Section 3(D) of the Order notifies another Department of its intention to downgrade or declassify, it shall allow the notified Department 30 days in which to express its objections before taking action.

D. Declassification of Material 30 Years Old. The head of each Department shall assign experienced personnel to assist the Archivist of the United States in the exercise of his responsibility under Section 5(E) of the Order to systematically review for declassification all materials classified before June 1, 1972, and more than 30 years old. Such personnel will: (1) provide guidance and assistance to archival employees in identifying and separating those materials originated in their Departments which are deemed to require continued classification; and (2) develop a list for submission to the head of the Department which identifies the materials so separated, with recommendations concerning continued classification. The head of the originating Department will then make the determination required under Section 5(E) of the Order and cause a list to be created which identifies the documentation included in the determination, indicates the reason for continued classification and specifies the date on which such material shall be declassified.

E. Notification of Expedited Downgrading or Declassification. When classified information or material is downgraded or declassified in a manner other than originally specified, whether scheduled or exempted, the classifier shall, to the extent practicable, promptly notify all addressees to whom the information or material was originally officially transmitted. In turn, the addressees shall notify any other known recipient of the classified information or material.

III. REVIEW OF CLASSIFIED MATERIAL FOR DECLASSIFICATION PURPOSES

A. Systematic Reviews. All information and material classified after the effective date of the Order and determined in accordance with Chapter 21, 44 U.S.C. (82 Stat. 1287) to be of sufficient historical or other value to warrant preservation shall be systematically reviewed on a timely basis by each Depart-

ment for the purpose of making such information and material publicly available in accordance with the determination regarding declassification made by the classifier under Section 5 of the Order. During each calendar year each Department shall segregate to the maximum extent possible all such information and material warranting preservation and becoming declassified at or prior to the end of such year. Promptly after the end of such year the Department responsible, or the Archives of the United States if transferred thereto, shall make the declassified information and material available to the public to the extent permitted by law.

B. Review for Declassification of Classified Material Over 10 Years Old. Each Department shall designate in its implementing regulations an office to which members of the public or Departments may direct requests for mandatory review for declassification under Section 5 (C) and (D) of the Order. This office shall in turn assign the request to the appropriate office for action. In addition, this office or the office which has been assigned action shall immediately acknowledge receipt of the request in writing. If the request requires the rendering of services for which fair and equitable fees should be charged pursuant to Title 5 of the Independent Offices Appropriations Act, 1952, 65 Stat. 290, 31 U.S.C. 483a the requester shall be so notified. The office which has been assigned action shall thereafter make a determination within 30 days of receipt or shall explain the reasons why further time is necessary. If at the end of 60 days from receipt of the request for review no determination has been made, the requester may apply to the Departmental Committee established by Section 7(B) of the Order for a determination. Should the office assigned action on a request for review determine that under the criteria set forth in Section 5(B) of the Order continued classification is required, the requester shall promptly be notified, and whenever possible, provided with a brief statement as to why the requested information or material cannot be declassified. The requester may appeal any such determination to the Departmental Committee and the notice of determination shall advise him of this right.

C. Departmental Committee Review for Declassification. The Departmental Committee shall establish procedures to review and act within 30 days upon all applications and appeals regarding requests for declassification. The Department head, acting through the Departmental Committee shall be authorized to over-rule previous determinations in whole or in part when, in its judgment, continued protection is no longer required. If the Departmental Committee determines that continued classification is required under the criteria of Section 5(B) of the Order it shall promptly so notify the requester and advise him that he may appeal the denial to the Interagency Classification Review Committee.

D. Review of Classified Material Over 30 Years Old. A request by a member of the public or by a Department under Section 5 (C) or (D) of the Order to review for declassification documents more than 30 years old shall be referred directly to the Archivist of the United States, and he shall have the requested documents reviewed for declassification in accordance with Part II.D. hereof. If the information or material requested has not been transferred to the General Services Administration for accession into the Archives, the Archivist shall, together with the head of the Department having custody, have the requested documents reviewed for declassification. Classification shall be continued in either case only where the head of the Department concerned makes at that time the personal determination required by Section 5(E)(1) of the Order. The Archivist shall promptly notify the requester of such determination and of his right to appeal the denial to the Interagency Classification Review Committee.

E. Burden of Proof for Administrative Determinations. For purposes of administrative determinations under B., C., or D. above, the burden of proof is on the originating Department to show that continued classification is warranted within the terms of the Order.

F. Availability of Declassified Material. Upon a determination under B., C., or D. above that the requested material no longer warrants classification it shall be declassified and made promptly available to the requester, if not otherwise exempt from disclosure under Section 552(b) of Title 5 U.S.C. (Freedom of Information Act) or other provision of law.

G. Classification Review Requests. As required by Section 5(C) of the Order, a request for classification review must describe the document with sufficient particularity to enable the Department to identify it and obtain it with a reasonable amount of effort. Whenever a request is deficient in its description of the record sought the requester should be asked to provide additional identifying informa-

tion whenever possible. Before denying a request on the ground that it is unduly burdensome, the requester should be asked to limit his request to records that are reasonably obtainable. If none-the-less the requester does not describe the records sought with sufficient particularity, or the record requested cannot be obtained with a reasonable amount of effort, the requester shall be notified of the reasons why no action will be taken and of his right to appeal such decision.

IV. MARKING REQUIREMENTS

A. *When Document or Other Material is Prepared.* At the time of origination, each document or other material containing classified information shall be marked with its assigned security classification and whether it is subject to or exempt from the General Declassification Schedule.

(1) For marking documents which are subject to the General Declassification Schedule, the following stamp shall be used:

(TOP SECRET, SECRET OR CONFIDENTIAL) CLASSIFIED

BY -----
SUBJECT TO GENERAL DECLASSIFICATION SCHEDULE OF EXECUTIVE ORDER 11652 AUTOMATICALLY DOWNGRADED AT TWO YEAR INTERVALS AND DECLASSIFIED ON DEC. 31
(insert year)

(2) For marking documents which are to be automatically declassified on a given event or date earlier than the General Declassification Schedule the following stamp shall be used:

(TOP SECRET, SECRET OR CONFIDENTIAL) CLASSIFIED

BY -----
AUTOMATICALLY DECLASSIFIED ON (effective date or event)

(3) For marking documents which are exempt from the General Declassification Schedule the following stamp shall be used:

(TOP SECRET, SECRET OR CONFIDENTIAL) CLASSIFIED

BY -----
EXEMPT FROM GENERAL DECLASSIFICATION SCHEDULE OF EXECUTIVE ORDER 11652 EXEMPTION CATEGORY (§ 5B (1), (2), (3), or (4)) AUTOMATICALLY DECLASSIFIED ON (effective date or event, if any)

Should the classifier inadvertently fail to mark a document with one of the foregoing stamps the document shall be deemed to be subject to the General Declassification Schedule. The person who signs or finally approves a document or other material containing classified information shall be deemed to be the classifier. If the classifier is other than such person he shall be identified on the stamp as indicated.

The "Restricted Data" and "Formerly Restricted Data" stamps (H. below) are, in themselves, evidence of exemption from the General Declassification Schedule.

B. *Overall and Page Marking of Documents.* The overall classification of a document, whether or not permanently bound, or any copy or reproduction thereof, shall be conspicuously marked or stamped at the top and bottom of the outside of the front cover (if any), on the title page (if any), on the first page, on the back page and on the outside of the back cover (if any). To the extent practicable each interior page of a document which is not permanently bound shall be conspicuously marked or stamped at the top and bottom according to its own content, including the designation "Unclassified" when appropriate.

C. *Paragraph Marking.* Whenever a classified document contains either more than one security classification category or unclassified information, each section, part or paragraph should be marked to the extent practicable to show its classification category or that it is unclassified.

D. Material Other Than Documents. If classified material cannot be marked, written notification of the information otherwise required in markings shall accompany such material.

E. Transmittal Documents. A transmittal document shall carry on it a prominent notation as to the highest classification of the information which is carried with it, and a legend showing the classification, if any, of the transmittal document standing alone.

F. Wholly Unclassified Material Not Usually Marked. Normally, unclassified material shall not be marked or stamped "Unclassified" unless the purpose of the marking is to indicate that a decision has been made not to classify it.

G. Downgrading, Declassification and Upgrading Markings. Whenever a change is made in the original classification or in the dates of downgrading or declassification of any classified information or material it shall be promptly and conspicuously marked to indicate the change, the authority for the action, the date of the action, and the identity of the person taking the action. In addition, all earlier classification markings shall be cancelled, if practicable, but in any event on the first page.

(1) **Limited Use of Posted Notice for Large Quantities of Material.** When the volume of information or material is such that prompt remarking of each classified item could not be accomplished without unduly interfering with operations, the custodian may attach downgrading, declassification or upgrading notices to the storage unit in lieu of the remarking otherwise required. Each notice shall indicate the change, the authority for the action, the date of the action, the identity of the person taking the action and the storage units to which it applies. When individual documents or other materials are withdrawn from such storage units they shall be promptly remarked in accordance with the change, or if the documents have been declassified, the old markings shall be cancelled.

(2) **Transfer of Stored Quantities Covered by Posted Notice.** When information or material subject to a posted downgrading, upgrading or declassification notice are withdrawn from one storage unit solely for transfer to another, or a storage unit containing such documents or other materials is transferred from one place to another, the transfer may be made without remarking if the notice is attached to or remains with each shipment.

H. Additional Warning Notices. In addition to the foregoing marking requirements, warning notices shall be prominently displayed on classified documents or materials as prescribed below. When display of these warning notices on the documents or other materials is not feasible, the warnings shall be included in the written notification of the assigned classification.

(1) **Restricted Data.** For classified information or material containing Restricted Data as defined in the Atomic Energy Act of 1954, as amended:

"RESTRICTED DATA"

This document contains Restricted Data as defined in the Atomic Energy Act of 1954. Its dissemination or disclosure to any unauthorized person is prohibited.

(2) **Formerly Restricted Data.** For classified information or material containing solely Formerly Restricted Data, as defined in Section 142.d., Atomic Energy Act of 1954, as amended:

"FORMERLY RESTRICTED DATA"

Unauthorized disclosure subject to Administrative and Criminal Sanctions. Handle as Restricted Data in Foreign Dissemination. Section 144.b., Atomic Energy Act, 1954.

(3) **Information Other Than Restricted Data or Formerly Restricted Data.** For classified information or material furnished to persons outside the Executive Branch of Government other than as described in (1) and (2) above:

"NATIONAL SECURITY INFORMATION"

Unauthorized Disclosure Subject to Criminal Sanctions.

(4) **Sensitive Intelligence Information.** For classified information or material relating to sensitive intelligence sources and methods, the following warning

notice shall be used, in addition to and in conjunction with those prescribed in (1), (2), or (3), above, as appropriate:

"WARNING NOTICE—SENSITIVE INTELLIGENCE SOURCES AND METHODS INVOLVED"

V. PROTECTION AND TRANSMISSION OF CLASSIFIED INFORMATION

A. *General*. Classified information or material may be used, held, or stored only where there are facilities or under conditions adequate to prevent unauthorized persons from gaining access to it. Whenever such information or material is not under the personal supervision of an authorized person, the methods set forth in *Appendix A* hereto shall be used to protect it. Whenever such information or material is transmitted outside the originating Department the requirements of *Appendix B* hereto shall be observed.

B. *Loss or Possible Compromise*. Any person who has knowledge of the loss or possible compromise of classified information shall immediately report the circumstances to a designated official of his Department or organization. In turn, the originating Department and any other interested Department shall be notified about the loss or possible compromise in order that a damage assessment may be conducted. An immediate inquiry shall be initiated by the Department in which the loss or compromise occurred for the purpose of taking corrective measures and appropriate administrative, disciplinary, or legal action.

VI. ACCESS AND ACCOUNTABILITY

A. *General Access Requirements*. Except as provided in B. and C. below, access to classified information shall be granted in accordance with the following:

(1) *Determination of Trustworthiness*. No person shall be given access to classified information or material unless a favorable determination has been made as to his trustworthiness. The determination of eligibility, referred to as a security clearance, shall be based on such investigations as the Department may require in accordance with the standards and criteria of E.O. 10450 and E.O. 10865 as appropriate.

(2) *Determination of Need-to-Know*. In addition to a security clearance, a person must have a need for access to the particular classified information or material sought in connection with the performance of his official duties or contractual obligations. The determination of that need shall be made by officials having responsibility for the classified information or material.

(3) *Administrative Withdrawal of Security Clearance*. Each Department shall make provision for administratively withdrawing the security clearance of any person who no longer requires access to classified information or material in connection with the performance of his official duties or contractual obligations. Likewise, when a person no longer needs access to a particular security classification category, the security clearance shall be adjusted to the classification category still required for the performance of his duties and obligations. In both instances, such action shall be without prejudice to the person's eligibility for a security clearance should the need again arise.

B. *Access by Historical Researchers*. Persons outside the Executive Branch engaged in historical research projects may be authorized access to classified information or material provided that the head of the originating Department determines that:

(1) The project and access sought conform to the requirements of Section 12 of the Order.

(2) The information or material requested is reasonably accessible and can be located and compiled with a reasonable amount of effort.

(3) The historical researcher agrees to safeguard the information or material in a manner consistent with the Order and Directives thereunder.

(4) The historical researcher agrees to authorize a review of his notes and manuscript for the sole purpose of determining that no classified information or material is contained therein.

An authorization for access shall be valid for the period required but no longer than two years from the date of issuance unless renewed under regulations of the originating Department.

C. *Access by Former Presidential Appointees*. Persons who previously occupied policy making positions to which they were appointed by the President, other than those referred to in Section 11 of the Order, may be authorized access to

classified information or material which they originated, reviewed, signed or received while in public office. Upon the request of any such former official, such information and material as he may identify shall be reviewed for declassification in accordance with the provisions of Section 5 of the Order.

D. *Consent of Originating Department to Dissemination by Recipient.* Except as otherwise provided by Section 102 of the National Security Act of 1947, 61 Stat. 495, 50 U.S.C. 403, classified information or material originating in one Department shall not be disseminated outside any other Department to which it has been made available without the consent of the originating Department.

E. *Dissemination of Sensitive Intelligence Information.* Information or material bearing the notation "WARNING NOTICE—SENSITIVE INTELLIGENCE SOURCES AND METHODS INVOLVED" shall not be disseminated in any manner outside authorized channels without the permission of the originating Department and an assessment by the senior intelligence official in the disseminating Department as to the potential risk to the national security and to the intelligence sources and methods involved.

F. *Restraint on Special Access Requirements.* The establishment of special rules limiting access to, distribution and protection of classified information and material under Section 9 of the Order requires the specific prior approval of the head of a Department or his designee.

G. *Accountability Procedures.* Each Department shall prescribe such accountability procedures as are necessary to control effectively the dissemination of classified information or material. Particularly stringent controls shall be placed on information and material classified Top Secret.

(1) *Top Secret Control Officers.* Top Secret Control Officers shall be designated, as required, to receive, maintain current accountability records of, and dispatch Top Secret material.

(2) *Physical Inventory.* A physical inventory of all Top Secret material shall be made at least annually. As an exception, repositories storing large volumes of classified material, shall develop inventory lists or other findings aids.

(3) *Current Accountability.* Top Secret and Secret information and material shall be subject to such controls including current accountability records as the head of the Department may prescribe.

(4) *Restraint on Reproduction.* Documents or portions of documents containing Top Secret information shall not be reproduced without the consent of the originating office. All other classified material shall be reproduced sparingly and any stated prohibition against reproduction shall be strictly adhered to.

(5) *Restraint on Number of Copies.* The number of copies of documents containing classified information shall be kept to a minimum to decrease the risk of compromise and reduce storage costs.

VII. DATA INDEX SYSTEM

Each Department originating classified information or material shall undertake to establish a data index system for Top Secret, Secret and Confidential information in selected categories approved by the Inter-agency Classification Review Committee as having sufficient historical or other value appropriate for preservation. The index system shall contain the following data for each document indexed: (a) Identity of classifier, (b) Department of origin, (c) Addressee, (d) Date of classification, (e) Subject/Area, (f) Classification category and whether subject to or exempt from the General Declassification Schedule, (g) If exempt, which exemption category is applicable, (h) Date or event set for declassification, and (i) File designation. Information and material shall be indexed into the system at the earliest practicable date during the course of the calendar year in which it is produced and classified, or in any event no later than March 31st of the succeeding year. Each Department shall undertake to establish such a data index system no later than July 1, 1973, which shall index the selected categories of information and material produced and classified after December 31, 1972.

VIII. COMBAT OPERATIONS

The provisions of the Order and this Directive with regard to dissemination, transmission, or safekeeping of classified information or material may be so modified in connection with combat or combat-related operations as the Secretary of Defense may by regulations prescribe.

IX. INTERAGENCY CLASSIFICATION REVIEW COMMITTEE

A. Composition of Interagency Committee. In accordance with Section 7 of the Order, an Interagency Classification Review Committee is established to assist the National Security Council in monitoring implementation of the Order. Its membership is comprised of senior representatives of the Department of State, Defense, and Justice, the Atomic Energy Commission, the Central Intelligence Agency, the National Security Council staff, and a Chairman designated by the President.

B. Meetings and Staff. The Interagency Committee shall meet regularly, but no less frequently than on a monthly basis, and take such actions as are deemed necessary to insure uniform compliance with the Order and this Directive. The Chairman is authorized to appoint an Executive Director, and to maintain a permanent administrative staff.

C. Interagency Committee's Functions. The Interagency Committee shall carry out the duties assigned it by Section 7(A) of the Order. It shall place particular emphasis on overseeing compliance with and implementation of the Order and programs established thereunder by each Department. It shall seek to develop means to (a) prevent overclassification, (b) ensure prompt declassification in accord with the provision of the Order, (c) facilitate access to declassified material and (d) eliminate unauthorized disclosure of classified information.

D. Classification Complaints. Under such procedures as the Interagency Committee may prescribe, it shall consider and take action on complaints from persons within or without the government with respect to the general administration of the Order including appeals from denials by Departmental Committees or the Archivist of declassification requests.

X. DEPARTMENTAL IMPLEMENTATION AND ENFORCEMENT

A. Action Programs. Those Departments listed in Section 2 (A) and (B) of the Order shall insure that adequate personnel and funding are provided for the purpose of carrying out the Order and Directives thereunder.

B. Departmental Committee. All suggestions and complaints, including those regarding overclassification, failure to declassify, or delay in declassifying not otherwise resolved, shall be referred to the Departmental Committee for resolution. In addition, the Departmental Committee shall review all appeals of requests for records under Section 522 of Title 5 U.S.C. (Freedom of Information Act) when the proposed denial is based on their continued classification under the Order.

C. Regulations and Reports. Each Department shall submit its proposed implementing regulations of the Order and Directives thereunder to the Chairman of the Interagency Classification Review Committee for approval by the Committee. Upon approval such regulations shall be published in the FEDERAL REGISTER to the extent they affect the general public. Each Department shall also submit to the said Chairman (1) copies of the record lists required under Part I.D. hereof by July 1, 1972 and thereafter quarterly, (2) quarterly reports of Departmental Committee actions on classification review requests, classification abuses and unauthorized disclosures, and (3) provide progress reports on information accumulated in the data index system established under Part VII hereof and such other reports as said Chairman may find necessary for the Interagency Classification Review Committee to carry out its responsibilities.

D. Administrative Enforcement. The Departmental Committees shall have responsibility for recommending to the head of the respective Departments appropriate administrative action to correct abuse or violation of any provision of the Order or Directives thereunder, including notifications by warning letter, formal reprimand, and to the extent permitted by law, suspension without pay and removal. Upon receipt of such a recommendation the head of the Department concerned shall act promptly and advise the Departmental Committee of his action.

Publication and Effective Date: This Directive shall be published in the FEDERAL REGISTER and become effective June 1, 1972.

HENRY A. KISSINGER,
Assistant to the President for
National Security Affairs.

May 17, 1972.

APPENDIX A

PROTECTION OF CLASSIFIED INFORMATION

A. Storage of Top Secret. Top Secret information and material shall be stored in a safe or safe-type steel file container having a built in three-position dial-type combination lock, vault, or vault-type room, or other storage facility which meets the standards for Top Secret established under the provisions of (C) below, and which minimizes the possibility of unauthorized access to, or the physical theft of, such information or material.

B. Storage of Secret or Confidential. Secret and Confidential material may be stored in a manner authorized for Top Secret information and material, or in a container or vault which meets the standards for Secret or Confidential, as the case may be, established under the provisions of (C) below.

C. Standards for Security Equipment. The General Services Administration shall, in coordination with Departments originating classified information or material, establish and publish uniform standards, specifications and supply schedules for containers, vaults, alarm systems and associated security devices suitable for the storage and protection of all categories of classified information and material. Any Department may establish for use within such Department more stringent standards. Whenever new security equipment is procured, it shall be in conformance with the foregoing standards and specifications and shall, to the maximum extent practicable, be of the type designated on the Federal Supply Schedule, General Services Administration.

D. Exception to Standards for Security Equipment. As an exception to (C) above, Secret and Confidential material may also be stored in a steel filing cabinet having a built in, three-position, dial-type combination lock; or a steel filing cabinet equipped with a steel lock bar, provided it is secured by a GSA approved changeable combination padlock.

E. Combinations. Combinations to security equipment and devices shall be changed only by persons having appropriate security clearance, and shall be changed whenever such equipment is placed in use, whenever a person knowing the combination is transferred from the office to which the equipment is assigned, whenever a combination has been subjected to possible compromise, and at least once every year. Knowledge of combinations shall be limited to the minimum number of persons necessary for operating purposes. Records of combinations shall be classified no lower than the highest category of classified information or material authorized for storage in the security equipment concerned.

F. Telecommunications Conversations. Classified information shall not be revealed in telecommunications conversations, except as may be authorized under Appendix B with respect to the transmission of classified information over approved communications circuits or systems.

G. Responsibilities of Custodians. Custodians of classified material shall be responsible for providing protection and accountability for such material at all times and particularly for locking classified material in approved security equipment whenever it is not in use or under direct supervision of authorized persons. Custodians shall follow procedures which insure that unauthorized persons do not gain access to classified information or material by sight or sound, and classified information shall not be discussed with or in the presence of unauthorized persons.

APPENDIX B

TRANSMISSION OF CLASSIFIED INFORMATION

A. Preparation and Receipting. Classified information and material shall be enclosed in opaque inner and outer covers before transmitting. The inner cover shall be a sealed wrapper or envelope plainly marked with the assigned classification and address. The outer cover shall be sealed and addressed with no indication of the classification of its contents. A receipt shall be attached to or enclosed in the inner cover, except that Confidential material shall require a receipt only if the sender deems it necessary. The receipt shall identify the sender, addressee, and the document, but shall contain no classified information. It shall be signed by the recipient and returned to the sender.

B. Transmission of Top Secret. The transmission of Top Secret information and material shall be effected preferably by oral discussions in persons between the officials concerned. Otherwise the transmission of Top Secret information and material shall be by specifically designated personnel, by State Department

diplomatic pouch, by a messenger courier system especially created for that purpose, over authorized communications circuits in encrypted form or by other means authorized by the National Security Council; except that in the case of information transmitted by the Federal Bureau of Investigation, such means of transmission may be used as are approved by the Director, Federal Bureau of Investigation, unless express reservation to the contrary is made in exceptional cases by the originating Department.

C. *Transmission of Secret.* The transmission of Secret material shall be effected in the following manner.

(1) *The Fifty States, District of Columbia, Puerto Rico.* Secret information and material may be transmitted within and between the forty-eight contiguous states and District of Columbia, or wholly within the State of Hawaii, the State of Alaska, or the Commonwealth of Puerto Rico by one of the means authorized for Top Secret information and material, the United States Postal Service registered mail and protective services provided by the United States air or surface commercial carriers under such conditions as may be prescribed by the head of the Department concerned.

(2) *Other Areas, Vessels, Military Postal Services, Aircraft.* Secret information and material may be transmitted from or to or within areas other than those specified in (1) above, by one of the means established for Top Secret information and material, captains or masters of vessels of United States registry under contract to a Department of the Executive Branch, United States registered mail through Army, Navy or Air Force Postal Service facilities provided that material does not at any time pass out of United States citizen control and does not pass through a foreign postal system, and commercial aircraft under charter to the United States and military or other government aircraft.

(3) *Canadian Government Installations.* Secret information and material may be transmitted between United States Government or Canadian Government installations, or both, in the forty-eight contiguous states, Alaska, the District of Columbia and Canada by the United States and Canadian registered mail with registered mail receipt.

(4) *Special Cases.* Each Department may authorize the use of the United States Postal Service registered mail outside the forty-eight contiguous states, the District of Columbia, the State of Hawaii, the State of Alaska, and the Commonwealth of Puerto Rico if warranted by security conditions and essential operational requirements provided that the material does not at any time pass out of the United States Government and United States citizen control and does not pass through a foreign postal system.

D. *Transmittal of Confidential.* Confidential information and material shall be transmitted within the forty-eight contiguous states and the District of Columbia, or wholly within Alaska, Hawaii, the Commonwealth of Puerto Rico, or a United States possession, by one of the means established for higher classifications, or by certified or first class mail. Outside these areas, Confidential information and material shall be transmitted in the same manner as authorized for higher classifications.

E. *Alternative Transmission of Confidential.* Each Department having authority to classify information or material as "Confidential" may issue regulations authorizing alternative or additional methods for the transmission of material classified "Confidential" outside the Department. In the case of material originated by another agency, the method of transmission must be at least as secure as the transmission procedure imposed by the originator.

F. *Transmission Within a Department.* Department regulations governing the preparation and transmission of classified information within a Department shall ensure a degree of security equivalent to that prescribed above for transmission outside the Department.

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REFORM IN THE CLASSIFICATION AND DECLASSIFICATION OF NATIONAL SECURITY INFORMATION: NIXON EXECUTIVE ORDER 11,652

(By Benedict Karl Zobrist II)

I. INTRODUCTION

Responding to the call for reform of the federal government's system of classifying state secrets,¹ President Nixon issued Executive Order 11,652² which, in his words, "established[ed] a new, more progressive system for classification and declassification of Government documents relating to national security."³ Becoming effective June 1, 1972,⁴ the Order is the latest attempt by the executive branch to accelerate the availability of government information withheld for security purposes.⁵

The conflicting interests surrounding such classified material may be stated simply to be the public's right to know and the government's duty to protect.⁶ Tracing the roots of the former, the concept of an informed citizenry is implicit in the rights guaranteed by the first amendment.⁷ A "popular" government which fails to provide information about its operations has been condemned by the Founding Fathers and contemporary officials alike.⁸ Yet, the need for some governmental secrecy was recognized in the Constitution itself,⁹ and has been accepted by the legislative and executive branches since the early days of the republic.¹⁰ Because of the dominant role the United States now plays in world affairs, confidentiality is a prerequisite to most of the dealings the federal government carries on with other nations. This degree of secrecy is desirable not only to protect the interest of the United States, but to create an atmosphere conducive to productive and uninhibited negotiations among all parties concerned.¹¹

The broad question this Note proposes to deal with is whether Executive Order 11,652 is an adequate solution to the problems of needless governmental secrecy and overclassification of documents no longer in daily use. Before proceeding on that issue, however, it will be necessary to examine the history of classification, primarily as a prerequisite to the understanding of a problem indigenous to the highly sophisticated governmental bureaucracy of the twentieth century. By illustrating how the present situation evolved from an elementary custodial function to a complex security operation, this section will provide a foundation from which to compare the Nixon Order with earlier systems. In this regard, the process will be reviewed from the legislative and executive bases for executive withholding of information, and the administration and protection of government records. Analysis of past practices will conclude with a survey of Executive

¹ See C. Barker & M. Fox, *Classified Files: The Yellowing Pages* 5, 85 (1972) [hereinafter cited as Barker & Fox]; Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. Pa. L. Rev. 271, 279-80 (1971); O'Neill, *The Accessibility of Sources for the History of the Second World War: The Archivist's Viewpoint*, 1972 *Prologue*: J. Nat'l Archives 25.

² Exec. Order No. 11,652, 3 C.F.R. 375 (1973).

³ 8 Weekly Compilation of Presidential Documents 542 (1972) [hereinafter cited as 8 Pres. Docs.].

⁴ Exec. Order No. 11,652, § 15, 3 C.F.R. 375, 386 (1973).

⁵ 8 Pres. Docs. 542.

⁶ *Id.* at 543. See Barker & Fox, *supra* note 1, at 106.

⁷ U.S. Const. amend. I. See T. Emerson, *Toward a General Theory of the First Amendment* 112 (1966); Z. Chafee, *Freedom of Speech* 34 (1920).

⁸ "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." 9 The Writings of James Madison 103 (G. Hunt ed. 1910). See generally *Hearings on U.S. Government Information Policies and Practices—Security Classification Problems Involving Subsection (b)(1) of the Freedom of Information Act (Part 7) Before a Subcommittee of the House Committee on Government Operations*, 92d Cong., 2d Sess. 2411-2420 (1972) [hereinafter cited as 1972 *Hearings*].

⁹ U.S. Const. art. I, § 5. "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as in their Judgment require Secrecy. . . ."

¹⁰ See Henkin, *supra* note 1, at 273-74.

¹¹ See 8 Pres. Docs., *supra* note 3, at 543; Barker & Fox, *supra* note 1, at 2-3, 106.

Orders 10,290¹² and 10,501,¹³ the attempts by the Truman and Eisenhower administrations, respectively, to cope with the growing problems of national security information and its reasonable disclosure. With this background, the Nixon Order will be considered from three perspectives: the limits it places on officials who classify and on the classification categories themselves; the automatic declassification mechanism it employs; and the mandatory review procedures it establishes for persons denied access to classified information. Finally, the system established by the Nixon Order will be evaluated on the basis of its first year of operation. In the process, an examination of four areas will be made: the prevention of overclassification; the facilitation of downgrading and declassification; the operation of the Interagency Classification Review Committee (ICRC), which monitors the implementation of the Order; and the new role of the government archivist brought on by the Order.

Although the issues outlined herein relate closely to those raised by the Pentagon Papers affair,¹⁴ questions surrounding freedom of the press and the propriety of investigative journalism will not be discussed.¹⁵ Similarly, problems encountered in the provisions of the Freedom of Information Act¹⁶ will not be covered. The Act will be mentioned only regarding certain mandatory review procedures which provide that if a declassification request is denied by all administrative bodies under the Nixon Order, the request may be taken to court via the relevant sections of the Act.¹⁷ The focus of this Note will center on the new procedures implemented for the creation and protection of national security material and its timely declassification and release to the public.

II. A BRIEF SURVEY OF CLASSIFICATION

A. Government Records Administration to 1951

The earliest files created by the United States government were controlled by an assortment of statutes which empowered executive department heads to have custody over all papers relating to their office. Known generally as the "house-keeping statute," it was actually a collection of statutes enacted between 1789 and 1872, there being no such single law.¹⁸ The first "provision" of the "house-keeping statute" was enacted when the Congress established a "department of foreign affairs,"¹⁹ later renamed the Department of State.²⁰ Similar supervisory duties were granted to the heads of Treasury,²¹ War,²² and Navy²³ Departments. These various provisions were combined into one uniform statute in 1875 which provided:

The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.²⁴

¹² Exec. Order No. 10290, 3 C.F.R. 1949-53 Comp. 789 (1958).

¹³ Exec. Order No. 10501, 3 C.F.R. 1949-53 Comp. 979 (1958).

¹⁴ For an analysis of the effects of the Pentagon Papers affair, see Henkin, *supra* note 1. See also *New York Times Co. v. United States*, 403 U.S. 713 (1971).

¹⁵ See generally H. Kriehbaum, *Pressures on the Press* (1972).

¹⁶ 5 U.S.C. § 552 (1970). Virtually since its inception, this statute has been popularly referred to as the Information Act or the Freedom of Information Act. See Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761 (1967); Note, *Administrative Law*, 49 Texas L. Rev. 780 (1971).

¹⁷ See text accompanying notes 166-68 *infra*.

¹⁸ See 49 Texas L. Rev. 780, 782 n. 13 (1971); See also the pre-1875 statutes cited in note 24 *infra*.

¹⁹ Act of July 27, 1789, ch. 4, § 4, 1 Stat. 28.

[T]he Secretary for the Department of Foreign Affairs . . . shall . . . be entitled to have the custody and charge of all records, books and papers in the office of Secretary for the Department of Foreign Affairs. . . .

²⁰ Act of Sept. 15, 1789, ch. 14, § 1, 1 Stat. 68.

²¹ Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67.

[W]hensoever the Secretary shall be removed from office by the President of the United States, or in any other case of vacancy in the office of Secretary, the Assistant shall, during the vacancy, have the charge and custody of the records, books, and papers appertaining to the said office.

The clear implication is that the Secretary shall have charge of such material while in office.

²² Act of Aug. 7, 1789, ch. 7, § 4, 1 Stat. 49, 50.

²³ Act of Apr. 30, 1798, ch. 35, § 3, 1 Stat. 553, 554.

²⁴ R.S. § 161 (1875). This section supersedes the following acts which were known collectively as the "housekeeping statute": Act of July 27, 1789, ch. 4, 1 Stat. 28 (Dep't of Foreign Affairs); Act of Aug. 7, 1789, ch. 7, 1 Stat. 49 (Dep't of War); Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (Dep't of Treasury); Act of Sept. 15, 1789, ch. 14, 1 Stat. 68 (Dep't of State succeeding Dep't of Foreign Affairs); Act of Apr. 30, 1798, ch. 35, 1 Stat. 553 (Dep't of Navy); Act of Mar. 3, 1849, ch. 108, 9 Stat. 395 (Dep't of Interior); Act of June 22, 1870, ch. 150, § 8, 16 Stat. 162 (Dep't of Justice); Act of June 8, 1872, ch. 335, 17 Stat. 283 (Post Office Dep't).

Subsequently, this statute was interpreted by the courts as allowing department heads in certain cases to order subordinates to refuse production of government documents, even if under a subpoena, because they contained information which was considered a matter of national security.²⁵ Because these cases never reached the question of the ultimate reach of the authority of the department head,²⁶ executive officers became vested with broad discretionary powers over executive records.²⁷ The statute, which came under attack from various sectors,²⁸ was amended in 1958 by Congress. A sentence was added stating that the "... section does not authorize withholding information from the public or limiting the availability of records to the public."²⁹ As finally incorporated into federal law, this provision does not affect the question of national security information withheld from disclosure because of executive control of the field, but remains an important congressional base upon which executive secrecy and the classification system are historically constructed.³⁰

The power to withhold information from the public does not stem from congressional sources alone.³¹ In a number of cases the courts have held, even in the absence of statutory authority, that the government is privileged to withhold confidential information bearing on the national defense or foreign relations.³² Although this privilege supposedly grew out of the common law,³³ the ultimate power of the Executive to refuse disclosure of government documents, where no statute bears on the subject, rests on presidential authority.³⁴ The first questions concerning such "executive privilege" occurred in 1792 when the House of Representatives sought information from the President concerning the failure of the St. Clair expedition against the Indians.³⁵ Although President Washington did deliver the documents to the House, he asserted that he was empowered with an executive discretionary power to refuse disclosure of papers that would injure the public.³⁶ In 1796 this privilege was exerted against the House, but not the Senate, when the President withheld documents concerning the peace treaty negotiations with England conducted by John Jay.³⁷ Although the House was "shocked" and debated the matter for a month,³⁸ the precedent was established and remains in use.³⁹

While the controversy over the scope of the "executive privilege" has continued to the present time, the subjects of the controversy—the sought-after records

²⁵ *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 466-68 (1951). See also *Boske v. Comingle*, 177 U.S. 459, 467-70 (1900); Appeal of the SEC, 226 F. 2d 501, 516 (6th Cir. 1955); *Ex parte Sackett*, 74 F. 2d 922, 923 (9th Cir. 1935); *In re Huttman*, 70 F. 699, 703 (D. Kan. 1895).

²⁶ See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467 (1951).

²⁷ F. Rourke, *Secrecy and Publicity: Dilemmas of Democracy* 48-49 (1966) [hereinafter cited as Rourke].

²⁸ *Id.* at 59-60.

²⁹ 5 U.S.C. § 301 (1970), formerly 5 U.S.C. § 22 (1964) (originally enacted as Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547).

³⁰ See Barker & Fox, *supra* note 1, at 9. The two other pieces of legislation the executive has used to justify withholding information from the public are the Administrative Procedure Act (APA) of 1946 and the Freedom of Information Act of 1966 which amends the APA and provides an exemption, among others, for national defense and foreign policy matters. *Id.* at 9-10; Rourke, *supra* note 27, at 56-58.

³¹ Rourke, *supra* note 27, at 63.

³² *United States v. Reynolds*, 345 U.S. 1, 7-8, 10 (1953); *Totten v. United States*, 92 U.S. 105, 106-07 (1875); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583, 585 (E.D.N.Y. 1939); *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353, 355-56 (E.D. Pa. 1912). See also Annot., 95 L. Ed. 425, 428-30 (1951).

³³ The common law privilege against disclosure has been held to exist in two areas: military and diplomatic affairs, and internal communications among executive officials. See Rourke, *supra* note 27, at 63-64; Annot., 95 L. Ed. 425, 428-30, 432-34 (1951). Concerning the first privilege, as to military and diplomatic affairs, its validity is well established. *E.g.*, *United States v. Reynolds*, 345 U.S. 1, 7-8, 10 (1953); *Republic of China v. National Union Fire Ins. Co.*, 142 F. Supp. 551, 556-57 (D. Md. 1956); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583, 585 (E.D.N.Y. 1939); *Pollen v. United States*, 85 Ct. Cl. 673, 681 (1937). But see *Cresmer v. United States*, 9 F.R.D. 203, 204 (E.D.N.Y. 1949). The privilege as to executive communications is also well established. *E.g.*, *United States v. Morgan*, 313 U.S. 409, 421-22 (1940); *Zacher v. United States*, 227 F. 2d 219, 226 (8th Cir. 1955), cert. denied, 350 U.S. 993 (1956); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324-27 (D.D.C. 1966), aff'd per curiam sub nom. *V.E.B. Carl Zeiss Jena v. Clark*, 384 F. 2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967); *Gardner v. Anderson*, 9 F. Cas. 1158, 1158-59 (No. 5220) (C.C.D. Md. 1876).

³⁴ See Rourke, *supra* note 27, at 64.

³⁵ Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. Pitt. L. Rev. 755, 756-58 (1959).

³⁶ Barker & Fox, *supra* note 1, at 8; Rourke, *supra* note 27, at 65.

³⁷ See Younger, *supra* note 35, at 757-58.

³⁸ *Id.* at 758.

³⁹ See Rourke, *supra* note 27, at 65-75. See also Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A.L. Rev. 1044 (1965); Wiggins, *Government Operations and the Public's Right To Know*, 19 Fed. B.J. 62 (1959).

and documents—accumulated in a most haphazard fashion.⁴⁰ In 1890 a Congressional committee found that the public papers were “in a state of great disorder and exposure.”⁴¹ Fires in 1814, 1833, and 1877, as well as at other times, destroyed valuable records.⁴² After the fire of 1877, a presidential commission was appointed to investigate the conditions under which the public records were kept.⁴³ At the commission’s behest, President Rutherford B. Hayes recommended the establishment of a national archives.⁴⁴ Although Congress authorized the development of building plans in 1913,⁴⁵ money was not appropriated for a suitable depository until 1926,⁴⁶ and the act creating the National Archives was not passed until 1934.⁴⁷ In spite of this delay and the massive job facing the National Archives in establishing guidelines for efficient records management, the task was accomplished with notable success.⁴⁸ However, with the advent of the Second World War, the successful practices of the past were severely challenged by an unprecedented flood of records which doubled the holdings of the Archives within two years.⁴⁹ It is estimated that there are not over 200 million documents in the National Archives exclusively related to World War II—a number which does not include possibly 50 million more documents pertaining to that period which are still with various departments and agencies.⁵⁰ Thus began the phenomenon known as the “paper explosion,” which simultaneously marked the beginning of the “age of passionate classification.”⁵¹ Postwar efforts to bring order to this confusion were primarily concerned with the protection of classified information, but in time attention shifted to overclassification and hypersecrecy. The Truman executive order was the first attempted solution to these problems.

B. Truman Executive Order 10,290

At the end of World War II, four classifications were used by departments handling national security information: Top Secret, Secret, Confidential, and Restricted.⁵² Despite the classification system’s objective of preventing the dissemination of sensitive material, it soon became clear that the restrictions were generally inefficient. President Truman, for instance, noted that a study performed by Yale University reported that 95 percent of all secret government information was being published in the press.⁵³ Executive Order 10,290 was issued on September 24, 1951 to establish minimum standards for the classification and maintenance of national security information,⁵⁴ but, as will be shown, because of the vagueness and generality of many sections, the Order was subjected to widespread criticism.⁵⁵

The Order retained the four-tiered classification system without providing much assistance in defining the variations among the classifications. The Top Secret label was given to information which, if disclosed “. . . would or could cause exceptionally grave danger to the national security.”⁵⁶ Secret information was that which required “extraordinary protection,” while Confidential information required only “careful protection.” The fourth category, Restricted, was applied to information requiring “. . . protection against unauthorized use or disclosure. . . .”⁵⁷ Although the Order stated that these categories should “. . . be used only for the purpose of identifying information which must be safeguarded to protect the national security,”⁵⁸ the number of persons authorized to classify was not limited at all. The delegation power extended to the very bounds of the executive branch itself.⁵⁹

⁴⁰ See H. G. Jones, *The Records of a Nation* 4–6 (1969).

⁴¹ T. Schellenberg, *Modern Archives* 7 (1956).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 8.

⁴⁶ See H. G. Jones, *supra* note 40, at 9–10.

⁴⁷ *Id.* at 14.

⁴⁸ See *id.* at 22–23.

⁴⁹ *Id.* at 26.

⁵⁰ See O’Neill, *The Accessibility of Sources for the History of the Second World War: The Archivist’s Viewpoint*, 1972 Prologue: J. Nat’l Archives 21.

⁵¹ *Id.* at 25.

⁵² See Barker & Fox, *supra* note 1, at 12.

⁵³ *Id.*

⁵⁴ Exec. Order No. 10,290, § 1(a), 3 C.F.R. 1949–53 Comp. 789, 790 (1958).

⁵⁵ See Barker & Fox, *supra* note 1, at 12–13.

⁵⁶ Exec. Order No. 10,290, § 25(b), 3 C.F.R. 1949–53 Comp. 789, 793 (1958).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* § 24 at 792. Section 24 states:

The ultimate responsibility for the safeguarding of classified security information within an agency shall remain with and rest upon the head of the agency, but the

Concerning declassification and downgrading,⁶¹ the measures provided by the Truman Order were quite inadequate in light of the millions of pages of documents with which the Order had to deal. No automatic declassification procedure was required, although such a mechanism would appear to be the most logical means of dealing with such an enormous amount of paper.⁶² The optional automatic procedure included in the Order was to be used only "wherever practicable" and required the classifying official to place a notation on the material stating the date or event after which the material could be downgraded or declassified.⁶³ The nonautomatic procedure, which came to be used almost exclusively, allowed downgrading or declassification when circumstances no longer warranted the original classification.⁶⁴ Review to determine when such circumstances were present was to be carried on "constantly," but no procedure was adopted to implement this review.⁶⁵ Consequently, throughout the Truman administration, declassification remained dormant and the stacks of paper grew.

Much criticism of the Truman Order came from the press, which charged that the system would allow officials to cover up mistakes and political intrigues under the veil of national security, while permitting officials to leak whatever classified material they wished.⁶⁶ *The New York Times* summarized such criticism in an editorial:

The Presidential order is broad in its powers but vague in its definitions. A striking weakness is the failure to make any provision for systematic and periodic review of how it is being put into use. Vast discretion is placed in the hands of a large number of officials with no adequate check upon how that discretion is exercised. The result is that the effect of this order will depend on a considerable number of very fallible human judgments.⁶⁷

In sum, the efforts of the Truman administration failed to curb overclassification, permitted unnecessary delegations of the authority to classify, and made little headway in the area of declassification.

C. Eisenhower Executive Order 10,501

Early in his first term, President Eisenhower responded to continued criticism of the classification system by issuing Executive Order 10,501 which would, he announced, "... make it possible for our citizens to know more of what their government is doing. . . ." ⁶⁸ Becoming effective December 15, 1953,⁶⁹ the Order made three basic changes in the system. It limited classification to three categories, eliminating the Restricted stamp.⁷⁰ It also decreased the number of agencies with authority to classify by restricting the number of agency heads who could delegate the authority to classify.⁷¹ Finally, it established the first procedures allowing for the declassification of documents no longer needing protection.⁷² In spite of these measures, however, it was soon evident that many of the secrecy loopholes remained.

head of an agency may delegate the performance of any or all of the functions charged to him herein, including . . . (c) Authorization of appropriate officials within his agency to assign information to the proper security classification under these regulations.

Such authorizations were to be held "to the minimum necessary for the performance of required activities" and "maintained at a high level within the agency." *Id.*

⁶⁰ To downgrade means "to assign a lower security classification than that previously assigned." Exec. Order No. 10290, § 17, 3 C.F.R. 1949-53 Comp. 790, 791 (1958).

⁶¹ An automatic declassification system is one that requires all information held to be downgraded and declassified after a stated number of years, so that when such a period of time has elapsed, the departments and agencies must affirmatively come forward and specify which documents they contend must remain classified. *See* Exec. Order 11652, § 5, 3 C.F.R. 375, 380 (1973). The burden of proof should be on the agency requesting the withholding extension. This type of system eliminates a page-by-page evaluation of suitability for declassification, and contains a review procedure to determine whether documents sought to be withheld need such protection. *See generally* Barker & Fox, *supra* note 1, at 88-90.

⁶² Exec. Order No. 10290, § 28(a), 3 C.F.R. 1949-53 Comp. 789, 794 (1958).

⁶³ *Id.* § 28(b).

⁶⁴ *Id.* § 28(c).

⁶⁵ *See* Barker & Fox, *supra* note 1, at 12-13.

⁶⁶ N.Y. Times, Sept. 28, 1951, at 30, col. 1.

⁶⁷ Rourke, *supra* note 27, at 75.

⁶⁸ Exec. Order No. 10,501, § 20, 3 C.F.R. 1949-53 Comp. 979, 986 (1958).

⁶⁹ *Id.* § 1, 3 C.F.R. 1949-53 Comp. at 979-80.

⁷⁰ *Id.* § 2, 3 C.F.R. 1949-53 Comp. 980.

⁷¹ Exec. Order No. 10,501, § 4, 3 C.F.R. 1949-53 Comp. 980-81 (1958).

Section I⁷² of the Order limited classification "in the interests of national defense"⁷³ to the categories of Top Secret, Secret, and Confidential. Top Secret was authorized "only for defense information or material which requires the highest degree of protection . . . the unauthorized disclosure of which could result in exceptionally grave damage to the Nation. . . ." ⁷⁴ The Secret classification applied to matters which, if disclosed without authorization, ". . . could result in serious damage to the Nation. . . ." ⁷⁵ The lowest classification, Confidential, was applied to ". . . defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation." ⁷⁶ Although all three categories are broad in their scope and language, the Confidential definition truly opened a Pandora's box. In would seem that practically any activity in the Department of Defense, for instance, could have been held to be a "defense interest," especially since there were few guidelines aiding classifying officers in their judgments. It is equally clear that many types of information could have been labeled "prejudicial," especially for psychological or political reasons at home or abroad.⁷⁷ Such vagueness placed a great amount of discretion in the overly cautious classifier.

In a second area of change, the Order sought to limit the number of agencies with full authority to use the classification system. However, after the original memorandum naming authorized agencies was supplemented six times, departments and agencies with full power to classify numbered thirty-four and those with limited power twelve.⁷⁸ The agencies with full power, ranging from the White House to the Interstate Commerce Commission, were considered to have primary responsibility for matters relating to national defense.⁷⁹ Such agency heads were given the power to delegate full classification authority to "responsible officers or employees," but were required to limit their delegation "as severely as is consistent with the orderly and expeditious transaction of Government business."⁸⁰ In agencies determined by the President to have only partial responsibility for national defense, only the agency head was authorized to classify, thus limiting the classification powers of such departments as Interior and Agriculture.⁸¹ In addition to the still high number of agencies given authority to classify, the general regulations promulgated under the Order allowed widespread delegation of classification power from authorized officials to lesser unauthorized officials. An army regulation, for example, permitted information too ". . . be classified CONFIDENTIAL by, or by authority of, any commissioned or warrant officer

⁷² Exec. Order No. 10,501, §§ 1(a)-(c), 3 C.F.R. 1949-53 Comp. 979, 979-80 (1958). Sections 1(a)-(c) read:

(a) *Top Secret*. Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States of its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.

(b) *Secret*. Except as may be expressly provided by statute, the use of the classification Secret shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological development important to national defense, or information revealing important intelligence operations.

(c) *Confidential*. Except as may be expressly provided by statute, the use of the classification Confidential shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation.

⁷³ *Id.* § 1(a).

⁷⁴ *Id.* § 1(a).

⁷⁵ *Id.* § 1(b).

⁷⁶ *Id.* § 1(c), 3 C.F.R. at 980.

⁷⁷ Parks, *Secrecy and the Public Interest in Military Affairs*, 26 Geo. Wash. L. Rev. 23, 57 (1957).

⁷⁸ For supplemental orders that document this expansion of the power to classify, see White House Memorandum of May 7, 1959, 24 Fed. Reg. 3777 (1959); White House Memorandum of Mar. 9, 1960, 25 Fed. Reg. 2073 (1960); Exec. Order No. 10901, 3 C.F.R. 1959-63 Comp. 432 (1964); Exec. Order No. 10985, 3 C.F.R. 1959-63 Comp. 518 (1964); Exec. Order No. 11097, 3 C.F.R. 1959-63 Comp. 750 (1964); Exec. Order No. 11382, 32 Fed. Reg. 16247 (1967).

⁷⁹ Exec. Order No. 10901, § 1, 3 C.F.R. 1959-63 Comp. 432 (1964), amending Exec. Order No. 10501, § 2, 3 C.F.R. 1949-53 Comp. 979 (1958).

⁸⁰ Exec. Order No. 10501, § 2(c), 3 C.F.R. 1949-53 Comp. 979, 980 (1958).

⁸¹ Exec. Order No. 10501, § 2(b), 3 C.F.R. 1949-53 Comp. 979, 980 (1958), as amended, Exec. Order No. 10901, § 1, 2(b), 3 C.F.R. 1959-63 Comp. 432 (1964).

or responsible civilian officer.”⁸² This instance of almost unrestricted authority to classify illustrates how a former high official in the Air Force Department could reasonably estimate in 1956 that perhaps a million people were classifying documents.⁸³ Thus, the controls imposed on the delegation of classification power were of little significance.

Finally, the Eisenhower Order sought to initiate procedures for declassification and downgrading of classified material by making each department and agency head responsible for continual review of such information. Formal procedures were to be established to preserve the integrity of the system and to eliminate unnecessary accumulation of classified material no longer requiring protection.⁸⁴ Automatic declassification was to be utilized “to the fullest extent practicable,” but still was not made mandatory.⁸⁵ When automatic declassification was not possible, the appropriate classifying authority was required to consent to any downgrading or declassification request made by the department currently in possession of the document.⁸⁶

In spite of these efforts, the overclassification situation remained the same. Congressional investigations revised ludicrous examples of concealed information,⁸⁷ but this was hardly surprising given the nature of a system whose prime interest is protecting security. Automatic declassification, largely ignored by the agencies, was first put into effect by the Department of Defense, which in 1960 called for downgrading at the end of each three-year period and declassification at the end of 12 years.⁸⁸ Critics pointed out, however, that the program was of little value, as the subjects exempted from the declassification outnumbered those affected.⁸⁹

President Kennedy attempted to stimulate the lethargic declassification process in 1961 by setting up four categories of classified information. Executive Order 10,964⁹⁰ required all information *not* falling within one of three groups, yet still describing highly sensitive material, to be relegated to the fourth group and be automatically declassified 12 years after classification.⁹¹ This 12-year rule for automatic declassification under the Kennedy Order remained in effect on paper until the Nixon Order. Unfortunately, this presidential directive was ignored, as were its predecessors dealing with automatic declassification.⁹²

⁸² A.R. 380-5, § 31, cited in Parks, *supra* note 77, at 60.

⁸³ See Parks, *supra* note 77, at 60.

⁸⁴ Exec. Order No. 10501, § 4, 3 C.F.R. 1949-53 Comp. 979, 980-81 (1958).

⁸⁵ *Id.* § 4(a), 3 C.F.R. 1949-53 Comp. at 981.

⁸⁶ *Id.* §§ 4(b), 18, 3 C.F.R. 1949-53 Comp. at 981, 986.

⁸⁷ See Rourke, *supra* note 27, at 76:

Congressman [John E.] Moss, for example, from his vantage point as chairman of the House Subcommittee on Government Information, has made much of the fact that enterprising bureaucrats, have acted under the authority of Executive Order 10501 in attempting to conceal information on such topics as the use of the bow and arrow in modern warfare and the telephone number from which an official weather forecast may be obtained from the Pentagon.

In 1955 the Navy Chief of Information refused to clear for publication in the Saturday Evening Post an article on the sinking of the *Indianapolis* during World War II because it might deter men from enlisting. See Parks, *supra* note 77, at 69-70.

⁸⁸ See Dep't of Defense Directive No. 5200.10, § V(D) (4) (June 29, 1960).

⁸⁹ See Rourke, *supra* note 27, at 81. See also Dep't of Defense Directive No. 5200.10, § V(B)-(C) (June 29, 1960).

⁹⁰ 3 C.F.R. 1959-63 Comp. 486 (1964).

⁹¹ Exec. Order No. 10,964, § 1(B), 3 C.F.R. 1959-63 Comp. 486, 487 (1964). The new guidelines stated:

In order to insure uniform procedures for automatic changes, heads of departments and agencies having authority for original classification of information or material . . . shall categorize such classified information or material into the following groups:

(1) *Group 1.* Information or material originated by foreign governments or international organizations and over which the United States Government has no jurisdiction, information or material provided for by statutes such as the Atomic Energy Act, and information or material requiring special handling, such as intelligence and cryptography. This information and material is excluded from automatic downgrading or declassification.

(2) *Group 2.* Extremely sensitive information or material which the head of the agency or his designees exempt, on an individual basis, from automatic downgrading and declassification.

(3) *Group 3.* Information or material which warrants some degree of classification for an indefinite period. Such information or material shall become automatically downgraded at 12-year intervals until the lowest classification is reached, but shall not become automatically declassified.

(4) *Group 4.* Information or material which does not qualify for, or is not assigned to, one of the first three groups. Such information or material shall become automatically downgraded at three-year intervals until the lowest classification is reached, and shall be automatically declassified twelve years after date of issuance. *Id.*

⁹² See Barker & Fox, *supra* note 1, at 15.

D. Summary

This examination of past governmental attempts to deal with national security information, its protection, and ultimate disclosure, is illustrative of the problems encountered by the American bureaucracy from its early history through the advent of the "paper explosion." The era of classification began with an overwhelming concern for the protection of state secrets and quickly resulted in mountains of classified material. It soon became evident that huge numbers of classified pages contained very little information which, if disclosed, would cause damage to the national security of the United States. However, the executive orders of the Truman, Eisenhower, and Kennedy administrations proved inadequate for the task of reducing overclassification and increasing declassification.

Consequently, when President Nixon issued Executive Order 11,652, millions of unnecessarily classified pages existed in the National Archives and in various departments, and more were being created each day. The attitude that a classified document, once a threat to national security, is always a threat to national security, remained to be challenged.⁹³

III. NIXON EXECUTIVE ORDER 11,652

Executive Order 11,652 was the result of an interagency committee study⁹⁴ initiated by President Nixon on January 15, 1971, which made recommendations to provide for speedier declassification while still protecting national security information.⁹⁵ In the presidential message accompanying the Order's issuance on March 8, 1972, considerable optimism was expressed in the tightening of the procedures and in the reversal of the burden of proof.⁹⁶ For the first time, the burden is on the originating office to show that continued classification is warranted whenever a request for release is made.⁹⁷ This requirement is contained in the National Security Council (NSC) Directive implementing the Order.⁹⁸

The Nixon plan will be considered from three standpoints. The Order initially strives to reduce the amount of material to be classified in the future. This effort will be examined by an analysis of those sections designed to limit the number of classifying officials and the scope of the classification categories themselves. Next, the automatic declassification procedures will be scrutinized in light of the sections which exempt specified material from such a general disclosure schedule. Finally, the discussion will analyze the mechanism of mandatory review, which was designed to ensure that departmental decisions on requests for classified information are reviewable. Discussion of the Order's major sections will serve as a vehicle to demonstrate its improvements over past executive orders, as well as to provide a foundation for later evaluation of the Order's first year of operation.

A. Controlling Classified Material and Classifiers

Executive Order 11,652 provides for three classification categories, Top Secret, Secret, and Confidential, to be used to protect the unauthorized disclosure of "national security information or material." Such classifiable material is defined as pertaining to the "national defense or foreign relations of the United States."⁹⁹ The Eisenhower Order, by contrast, had used the term "national defense" to describe the information it affected.¹⁰⁰ This change from "national

⁹³ *Id.*

⁹⁴ This interagency committee was initially headed by William H. Rehnquist, formerly an assistant attorney general and now an Associate Justice of the Supreme Court. Assistant Attorney General Ralph E. Erickson then chaired the committee until David Young, a special assistant to the National Security Council, succeeded him. See White House Press Release of John D. Ehrlichman and David Young at 1-3, Mar. 8, 1972 [hereinafter cited as White House Press Release]. Young is considered by some to be the major architect of the Executive Order, according to Congressman William S. Moorhead, and is a member of the Interagency Classification Review Committee. See 1972 *Hearings*, *supra* note 8, at 2451, 2912. He is at present head of declassification operations at the White House. See N.Y. Times, Nov. 22, 1972, at 40, col. 5.

⁹⁵ See 8 Pres. Docs., *supra* note 3, at 543.

⁹⁶ *Id.*

⁹⁷ See National Security Council Directive Governing the Classification, Downgrading, Declassification and Safeguarding of National Security Information, 37 Fed. Reg. 10,053, 10,056 (1972) [hereinafter cited as NSC Directive].

⁹⁸ *Id.* Under section 7 the National Security Council is given the responsibility of monitoring the implementation of the Order, See Exec. Order No. 11,652, § 7, 3 C.F.R. 375, 383 (1973).

⁹⁹ See *id.* § 1, 3 C.F.R. at 375-76.

¹⁰⁰ Exec. Order No. 10501, § 1, 3 C.F.R. 1949-53 Comp. 979 (1958).

defense" to "national security" information has been noted as a possible broadening of the scope of classifiable information by the Nixon Order.¹⁰¹ However, it seems unlikely that any change in the type of material previously covered will occur.

Section 1 (A) defines Top Secret as

... that national security information or material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security.¹⁰²

Examples given in the Order of such damage include armed hostilities against the United States or its allies, and the revelation of sensitive intelligence operations.¹⁰³ Secret is defined in section 1 (B) as referring to national security information or material requiring "a substantial degree of protection," and the test for assigning such a classification is " ... whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security."¹⁰⁴ Information is Confidential if its "unauthorized disclosure could reasonably be expected to cause damage to the national security."¹⁰⁵ Implicit in these definitions is a reasonableness test which is not found in any previous executive orders dealing with this subject. The Truman Order, for example, spoke of dangers that "could" or "might" be caused by disclosure.¹⁰⁶ The Eisenhower Order used basically the same language, requiring only a showing of possible prejudice before the Confidential stamp was applied.¹⁰⁷ Under the Nixon Order, there must be a reasonable connection between disclosure and damage to justify classification.¹⁰⁸ The Administration argues that this reasonableness test " ... is to get the message across to the departments and agencies ... that they have to ... use their discretion ... " ¹⁰⁹ before classifying information. A rational and realistic link must be apparent between the information and the dangers of its disclosure.

Under section two, the authority to classify material Top Secret is limited to three groups of persons in 23 departments, agencies, and executive offices.¹¹⁰ Previously 34 such bodies were given Top Secret authority.¹¹¹ These groups under the Nixon Order consist of: (1) the heads of the listed departments; (2) such senior principal deputies and assistants as the heads may designate *in writing*; (3) such heads and senior principal deputies and assistants of "major elements" of such departments as the departmental head may designate *in writing*.¹¹² These individuals, of course, have the power to classify material Secret and Confidential as well.¹¹³ Departments given only Secret and Confidential classification authority are listed in section 2 (B) and are thirteen in number.¹¹⁴ No other departments are given any classification power; such power may only be conferred by executive order.¹¹⁵ It is estimated that the number of people authorized to classify Top Secret has been reduced from 5,100 to 1,860 because of such measures,¹¹⁶ and as of

¹⁰¹ See 1972 *Hearings*, *supra* note 8, at 2850, 2852-53; White House Press Release at 10.

¹⁰² Exec. Order No. 11652, § 1 (A), 3 C.F.R. 375, 376 (1973).

¹⁰³ *Id.*

¹⁰⁴ *Id.* § 1 (B).

¹⁰⁵ *Id.* § 1 (C).

¹⁰⁶ Exec. Order No. 10290, § 25 (b), 3 C.F.R. 1949-53 Comp. 789, 793 (1958).

¹⁰⁷ Exec. Order No. 10501, § 1, 3 C.F.R. 1949-53 Comp. 979-80 (1958).

¹⁰⁸ See White House Press Release at 3.

¹⁰⁹ *Id.* at 4.

¹¹⁰ Exec. Order No. 11652, § 2 (A), 3 C.F.R. 375, 377 (1973). Section 2 (A) gives top secret authority to the following: Central Intelligence Agency, Atomic Energy Comm'n, Dep't of State, Dep't of the Treasury, Dep't of Defense, Dep't of the Army, Dep't of the Navy, Dep't of the Air Force, United States Arms Control and Disarmament Agency, Dep't of Justice, Nat'l Aeronautics and Space Administration, Agency for Int'l Dev., and offices in the Executive Office of the President which the President may designate in writing.

These offices have been designated in an accompanying order as: The White House Office, Nat'l Security Council, Office of Management and Budget, Domestic Council, Office of Science and Technology, Office of Emergency Preparedness, President's Foreign Intelligence Advisory Bd., Council on Int'l Economic Policy, Council of Economic Advisers, Nat'l Aeronautics and Space Council, and the Office of Telecommunications Policy. See 8 Pres. Docs., *supra* note 3, at 550.

¹¹¹ See Exec. Order No. 10501, § 2, 1949-53 Comp. 979, 980 (1958), as amended by Exec. Order No. 10901, § 1, 3 C.F.R. 1959-63 Comp. 432 (1964); Exec. Order No. 10985, 3 C.F.R. 1959-63 Comp. 518 (1964); Exec. Order No. 11097, 3 C.F.R. 1959-63 Comp. 750 (1964); and Exec. Order No. 11382, 32 Fed. Reg. 16247 (1967).

¹¹² Exec. Order No. 11652, § 2 (A), 3 C.F.R. 375, 377 (1973).

¹¹³ *Id.* §§ 2 (B) (1), 2 (C), 3 C.F.R. at 377-78.

¹¹⁴ *Id.* § 2 (B), 3 C.F.R. at 377-78. Departments allowed to classify material Secret and Confidential only are: Dep't of Transportation, Fed. Communications Comm'n, Export-Import Bank of the United States, Dep't of Commerce, United States Civil Service Comm'n, United States Information Agency, Gen. Services Administration, Dep't of Health, Educ. and Welfare, Civil Aeronautics Bd., Fed. Maritime Comm'n, Fed. Power Comm'n, Nat'l Science Foundation, and Overseas Private Investment Corp. *Id.*

¹¹⁵ *Id.* § 2 (D), 3 C.F.R. at 378.

¹¹⁶ See White House Press Release at 3.

August, 1972 an Administration official claimed that the overall number of authorized classifiers dropped by 63 percent.¹¹⁷ Loopholes still remain, however, which allow Top Secret classifiers to grant Secret authority to "such subordinates" designated in writing and permit Top Secret and Secret classifiers to give Confidential authority to "such officials as they may designate in writing."¹¹⁸ Although the possibility of indiscriminate classification still exists, the "in writing" requirement should help to mitigate widespread abuse of such power. To further lessen the possibilities of abuse, the National Security Council Directive states that "[t]he person at the highest level authorizing the classification must be identified on the face of the information . . . classified. . . ." ¹¹⁹ Similar language is found in the Order itself.¹²⁰ If the identity of such person poses a security problem, the department must establish another means by which he can be traced.¹²¹ Each department is also required to maintain lists of all officials with any classifying power and must update them at least on a quarterly basis.¹²² Similarly, where such a listing might disclose sensitive intelligence information the department must establish some other record for ready identification of such persons.¹²³

Classifiers are held personally accountable for their actions under the Order, and are told to avoid unnecessary classification.¹²⁴ The official policy states that:

In no case shall information be classified in order to conceal inefficiency or administrative error, to prevent embarrassment to a person or Department, to restrain competition or independent initiative, or to prevent for any other reason the release of information which does not require protection in the interest of national security.¹²⁵

If a holder of classified material believes that the assigned classification is improper, he shall inform the originator and a re-examination of the material shall take place.¹²⁶

As a final precaution, the NSC Directive provides that where a classifier has "any substantial doubt" about which classification category is proper or whether the material should be classified at all, the less restrictive treatment should be applied.¹²⁷ Any official who overclassifies or unnecessarily classifies information shall be notified that his or her action is in violation of the Order, and repeated abuses shall be grounds for administrative reprimand.¹²⁸ Such a task will probably belong to the respective departmental committees overseeing implementation of the Order within their agency.¹²⁹

B. Declassification and Downgrading

A major innovation of Executive Order 11,652 is the general declassification schedule (GDS) which applies to all information and material not falling into one of four specific exemptions.¹³⁰ As each classified document is required to show on its face its classification and whether it is subject to or exempt from the schedule, the system should not prove difficult to operate.¹³¹

The GDS provides that Top Secret information, originally classified as such, will be automatically downgraded to Secret at the end of two years from origin, automatically downgraded to Confidential at the end of four years, and declassified at the end of ten years. Information originally classified as Secret will be automatically downgraded to Confidential at the end of two years, and declassified at the end of eight years.¹³² Information originally classified Confidential will be declassified six years after origin.¹³³ Material may be exempted from this

¹¹⁷ 1972 *Hearings*, *supra* note 8, at 2911-12.

¹¹⁸ Exec. Order No. 11652, §§ 2(B) (2), 2(C), 3 C.F.R. 375, 377-78 (1973).

¹¹⁹ *NSC Directive*, § I(C), 37 Fed. Reg. 10053 (1972).

¹²⁰ Exec. Order No. 11652, § 4(B), 3 C.F.R. 375, 379 (1973).

¹²¹ *NSC Directive*, § I(D), 37 Fed. Reg. 10053 (1972).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Exec. Order No. 11652, § 4, 3 C.F.R. 375, 379 (1973).

¹²⁵ *Id.*

¹²⁶ *Id.* § 4(D), 3 C.F.R. at 380.

¹²⁷ *NSC Directive*, § I(E), 37 Fed. Reg. at 10053-54 (1972).

¹²⁸ Exec. Order No. 11652, § 13(A), 3 C.F.R. 375, 386 (1973).

¹²⁹ *Id.* § 7(B) (2), 3 C.F.R. at 384.

¹³⁰ *Id.* §§ 5(A)-(B), 3 C.F.R. at 380-81.

¹³¹ *Id.* § 4(A), 3 C.F.R. at 379. Classified documents must also show the office of origin, the date of preparation and classification and, to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use. *Id.*

¹³² *Id.* § 5(A), 3 C.F.R. at 380.

¹³³ *Id.*

schedule only if an official with Top Secret authority finds that it falls into one of the following exemptions:

(1) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.

(2) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources or methods.

(3) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security.

(4) Classified information or material the disclosure of which would place a person in immediate jeopardy.¹³⁴

In applying the GDS to papers classified under the pre-Nixon system, only the information which was subject to automatic declassification in 12 years is included in the schedule. The 12-year rule was adopted in the Kennedy Order which, although modifying the Eisenhower system, was not fully implemented, as discussed earlier.¹³⁵ All other classified papers remain excluded, except that after ten years from their origin, they are subject to a mandatory review.¹³⁶ This review procedure is applicable to all classified information created after the effective date of the Nixon Order.¹³⁷

Classified information created under the Nixon Order and exempted from the GDS shall be automatically declassified at the end of 30 years.¹³⁸ This will occur unless the head of the originating department personally determines in writing that specifically identified information must remain classified.¹³⁹ That individual must show that such continued protection is essential to the national security or would place a person in immediate danger, and must indicate the necessary period of continued classification.¹⁴⁰ Information classified before the effective date of the Order is to be reviewed for declassification by the Archivist of the United States under these same provisions.¹⁴¹

In general, the authority to declassify or downgrade documents belongs to the original classifier, to a successor in capacity, or a supervisory official of either.¹⁴² Department heads may also authorize persons to exercise such power.¹⁴³ Matters become more complex when departments and agencies are eliminated or merged. The department receiving the papers of the old body in a transfer of functions is considered the originating body.¹⁴⁴ Similarly, when a department ceases to exist, but an official transfer is not made, each department in possession of any records is considered the originating body, and may downgrade or declassify such material after consulting with any other departments having an interest in the subject matter.¹⁴⁵ Classified information transferred to the National Archives for accession may be downgraded or declassified by the Archivist of the United States in accordance with these procedures.¹⁴⁶

Great changes have been made in the declassification procedures under the Nixon Order. A general declassification schedule applying to nonexempted classified documents will provide access to all such material within eight years. The material exempted must fall within four categories which, while not providing the narrowest, abuse-proof definitions, seem about as specific as possible when defining critical intelligence information. The Order also provides a mandatory 30-year declassification for all exempted information, unless specific authorization is received from the head of the department requesting that the information remain classified. These procedures coupled with the following mandatory review process, should result in a substantial increase in the flow of declassified material.

C. Mandatory Review

The Nixon Order sets out a mandatory review procedure for dealing with requests for classified material. The first level of review may occur at any time

¹³⁴ *Id.* § 5(B), 3 C.F.R. at 380-81.

¹³⁵ See notes 91-92 *supra* and accompanying text.

¹³⁶ Exec. Order No. 11652, § 5(D), 3 C.F.R. 375, 381-82 (1973). Review procedures are discussed in notes 147-168 *infra* and accompanying text.

¹³⁷ *Id.*

¹³⁸ *Id.* § 5(E) (1), 3 C.F.R. at 382.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* § 5(E) (2), 3 C.F.R. at 382.

¹⁴² *Id.* § 3(A), 3 C.F.R. at 378.

¹⁴³ *Id.* § 3(B), 3 C.F.R. at 378.

¹⁴⁴ *Id.* § 3(C).

¹⁴⁵ *Id.* § 3(D).

¹⁴⁶ *Id.* § 3(E), 3 C.F.R. at 379.

after the document is ten years old.¹⁴⁷ A department or member of the public desiring a review must describe the record sought "with sufficient particularity" to enable identification, and the record must be capable of being obtained "with only a reasonable amount of effort."¹⁴⁸ As would be expected, the words "particularity" and "reasonable" have caused concern in some circles. An unofficial analysis of the Order prepared by the House Foreign Operations and Government Information Subcommittee asserted that

... the usefulness of the review procedure in speeding the declassification of previously exempted information or materials is strictly limited by provisos (2) ["sufficient particularity"] and (3) ["reasonable effort"] so that it is almost meaningless.¹⁴⁹

Such a charge appears to be overstated when one realizes that these requirements are not materially different from those established under the Freedom of Information Act. Department of Defense regulations implementing that Act state that "[a] request for a record will be honored if . . . [t]he requester describes the record sought with sufficient particularity to enable the Department . . . to locate the record requested with a reasonable amount of effort."¹⁵⁰ Other bodies have similar requirements.¹⁵¹ However, if early attempts to procure information from the State or Defense Departments are any indication, problems with such language are to be expected.¹⁵² For example, the State Department rejected all of 31 requests for material submitted by *The New York Times* in June, 1972, stating that the information could not be located with "a reasonable amount of effort" because it was not described "with sufficient particularity."¹⁵³ The rejection was termed "ill-advised" by David Young, former executive director of the Inter-agency Classification Review Committee, who suggested that "some gesture . . . of good faith" should have been made.¹⁵⁴ Whether such a gesture would have provided the *Times* with any of the material they were seeking was not indicated. Later that year, the State Department processed three out of the 31 requests, costing the newspaper \$194.90, and providing it with 180 pages of material which revealed no new information.¹⁵⁵

The tests of "particularity" and "reasonable effort" are crucial to the operation of mandatory review—a restrictive interpretation of these terms by the departments could effectively obstruct any meaningful review procedure. Generally speaking, without having researched the area upon which information is sought, a requester will find it very difficult to describe the material in such a manner. Therefore, a careful preliminary inquiry into the topic is necessary to provide, as nearly as possible, the date and subject matter of the document desired.¹⁵⁶ If a requester cannot provide sufficient information to enable the department to locate and produce the records, any substantive review of the document is precluded because the preliminary tests are not met.¹⁵⁷

Assuming the tests of "particularity" and "reasonable effort" are met but access is denied because continued classification is required under the Order, the requester may appeal any such determination to the departmental review committee.¹⁵⁸ This committee must act within 30 days upon such applications, and it is provided that the department head may act through the committee to declassify such material when he or she makes a determination that protection is no longer needed.¹⁵⁹ If the determination is not in favor of the requester, a further appeal

¹⁴⁷ *Id.* § 5(C), 3 C.F.R. at 381. How strict the departments will be in holding to the requirement that information be classified for ten years is not certain in light of certain language in the NSC Directive. The implementing Directive provides that

the Departmental Committees shall review all appeals of requests for records under Section 5[5]2 of Title 5 U.S.C. (Freedom of Information Act) when the proposed denial is based on their continual classification under the Order. 37 Fed. Reg. 10053, 10062-63 (1972).

This statement, coupled with the Directive's order that "[c]lassified information . . . shall be declassified as soon as there are no longer any grounds for continued classification," may be read as allowing a mandatory review procedure to be initiated before a classified document is ten years old. *Id.* at 10054.

¹⁴⁸ Exec. Order No. 11652, § 5(C), 3 C.F.R. 375, 381 (1973).

¹⁴⁹ See 1972 *Hearings*, *supra* note 8, at 2862.

¹⁵⁰ 32 C.F.R. § 286.7(c)(1) (1972).

¹⁵¹ See 22 C.F.R. § 6.7 (1972) (Dep't of State); 14 C.F.R. § 401.6(b) (1972) (Nat'l Transp. Safety Bd.).

¹⁵² See *N.Y. Times*, Nov. 22, 1972, at 40, col. 4-6.

¹⁵³ *Id.* at col. 4.

¹⁵⁴ *Id.* at col. 6.

¹⁵⁵ *Id.*

¹⁵⁶ Interview with staff members, Harry S. Truman Library, Independence, Mo., Apr. 9, 1973.

¹⁵⁷ Exec. Order No. 11652, § 5(C), 3 C.F.R. 375, 381 (1973).

¹⁵⁸ NSC Directive, § III(B), 37 Fed. Reg. at 10055 (1972).

¹⁵⁹ NSC Directive, § III(C), 37 Fed. Reg. at 10055-56 (1972).

may be made to the Interagency Classification Review Committee (ICRC).¹⁶⁰ The ICRC was created by Executive Order 11,652 and is designed to monitor the implementation of the Order.¹⁶¹ It is composed of representatives for the Departments of State, Defense, and Justice, the Atomic Energy Commission, the Central Intelligence Agency, and the National Security Council. The President appoints the chairman of the committee.¹⁶² Meeting on a regular and active basis, the Committee's task is fourfold.

It shall seek to develop means to (a) prevent overclassification, (b) ensure prompt declassification in accord with the provisions of the Order, (c) facilitate access to declassified material and (d) eliminate unauthorized disclosure of classified information.¹⁶³

In conjunction with these duties the ICRC will take action on suggestions and complaints from persons "within or without" government with respect to the administration of the Order.¹⁶⁴ This, of course, includes appeals from denials of declassification requests by departmental committees or the Archivist of the United States.¹⁶⁵ If disclosure is denied at this level, the complainant may file suit in United States district court under the provisions of the Freedom of Information Act.¹⁶⁶ Although not stated as such in the Order, it is generally agreed that such a remedy is available; some government officials go so far as to say that the Order is based on the Act.¹⁶⁷ Evidently, this position is based on a reading of the prefatory sentences of the Order mentioning the Act, as well as language in the NSC Directive.¹⁶⁸ Regardless, there is no reason to believe that the validity of a suit under the Act would be affected by the procedures under the Order. There is no language to indicate anything contrary to the legislative intent expressed in the Freedom of Information Act. It is hoped, however, that the two-level review procedure provided under the Nixon Order will make frequent reliance on the legal formalities of the Act unnecessary.

D. Summary

Executive Order 11,652 significantly changes the form of classification and declassification procedures. It employs a "reasonableness" standard in the application of the Top Secret, Secret, and Confidential categories to national security information. The number of classifiers has been reduced, but loopholes remain in the delegation power given to senior departmental officials, and the effectiveness of the "in writing" requirement when delegation is exercised remains to be evaluated. The implementation of the general declassification schedule should facilitate eliminating indefinite classifications and the opening of certain files at earlier dates. However, the effects of the system will not be known for at least ten years, the date of the first scheduled Top Secret declassification. Whether the exemptions to automatic declassification are narrow enough to prevent them from becoming hiding places for non-sensitive information is also questionable. Finally, a long needed review system was established, but its effectiveness appears dependent on the departments' construction of the terms "sufficient particularity" and "reasonable effort." If construed narrowly, the Order's intent to provide procedural due process will be seriously hampered.¹⁶⁹ However, if interpreted with regard to the Order's policy of early access without injury to national security, mandatory review will be an innovative method for limited declassification.

IV. A PRELIMINARY EVALUATION OF EXECUTIVE ORDER 11,652

Executive Order 11,652 is now in its second year of operation; the long-range effect it will have on the federal government and its mountains of classified documents cannot be seen today. However, even after one year, certain direc-

¹⁶⁰ *Id.*

¹⁶¹ Exec. Order No. 11652, § 7, 3 C.F.R. 375, 383-84 (1973).

¹⁶² *Id.*

¹⁶³ NSC Directive, § IX(C), 37 Fed. Reg. at 10062 (1972).

¹⁶⁴ Exec. Order No. 11652, § 7(A) (2), 3 C.F.R. 375, 384 (1973).

¹⁶⁵ NSC Directive, § III(C), 37 Fed. Reg. at 10055-56 (1972).

¹⁶⁶ See White House Press Release at 9. David Young, former executive director of the ICRC, made the following statement at a press conference:

There is a two-tier mechanism. The department will establish a Review Committee, and then you will move up to the Inter-Agency Committee, and then if you are unhappy, you can go to court. That is where the Freedom of Information Act comes in. What we have done is give the court a means for interpreting that exemption [§ 552(b) (1)] of the Freedom of Information Act. *Id.*

¹⁶⁷ Telephone interview with National Archives staff member, Washington, D.C., Apr. 10, 1973.

¹⁶⁸ Exec. Order No. 11652, 3 C.F.R. 375 (1973); NSC Directive, § X(B), 37 Fed. Reg. at 10062-63 (1972).

¹⁶⁹ Interview with staff members, Harry S. Truman Library, Independence, Mo., Apr. 9, 1973.

tions and trends may be observed and analyzed. Looking toward such events, this section will evaluate developments under the Order in four areas: the prevention of overclassification, the facilitation of downgrading and declassification, the Interagency Classification Review Committee (ICRC), and the new role of the government archivist.

A. Prevention of Overclassification

To eliminate future abuses of the classifying power the Order not only attempted to narrow the definitions of the classification categories,¹⁷⁰ but also authorized the reduction of the number of classifiers and required the use of lists of such persons as a monitoring device.¹⁷¹ Each department must maintain updated lists of all officials with classification power.¹⁷² The basic function of the lists is to provide an easy method for ascertaining how many and which officials have been authorized to classify information. A potential problem, however, is posed by the use of so-called control labels which are administrative signals stamped on many government documents, classified and nonclassified, to control employee access to them. The possibility of these labels evolving into an unofficial classification system within the official one, causing added confusion and secrecy, may be determinative of the Order's success within the bureaucracy. In the following discussion, these administrative practices will be examined in light of the Order's policy goal of eliminating overclassification. Finally, the issue of sanctions, both administrative and statutory, will be discussed as a means of deterring abuse of the classification power.

Under the direction of the National Security Council (NSC), the ICRC has reduced the number of persons authorized to classify.¹⁷³ According to the ICRC Progress Report, issued March 31, 1973:

Since June 1, 1972, the number of officials with authority to classify in the Federal Government has been reduced 63% from 48,814 to 17,883 (the CIA has reduced total classifiers by 3%). The number of officials with Top Secret authority (and accordingly with authority to exempt from the General Declassification Schedule) has been reduced 71% from 3,634 to 1,056 (the CIA has reduced Top Secret classifiers by 81%) . . .¹⁷⁴

This is a substantial achievement on the part of the ICRC, and provides an effective rebuttal to critics who charged that the new Order would lift the previously loose limitations on persons wielding classification stamps and proliferate their number beyond control.¹⁷⁵ These charges were voiced soon after the Order was announced in March, 1972,¹⁷⁶ and were based only upon an analysis of the Order's language without the benefit of the NSC Directive which was issued May 17, 1972.¹⁷⁷ After viewing the system at work for more than a year, the conclusion is inescapable that the Order itself was meant to be a preliminary set of guidelines and policy statements; it was the subsequently issued NSC Directive which has put the new policy in motion and made good, at least for the present, the promises of reform contained in Executive Order 11,652.¹⁷⁸ The

¹⁷⁰ See text accompanying notes 104-09 *supra*.

¹⁷¹ See text accompanying notes 110-23 *supra*.

¹⁷² See text accompanying notes 122-23 *supra*.

¹⁷³ See N.Y. Times, Apr. 25, 1973, at 14, col. 3. The ICRC was established under section 7 of the Order to assist the National Security Council in monitoring the implementation of the Order. Exec. Order 11652, § 7, 3 C.F.R. 375, 383 (1973).

¹⁷⁴ Progress Report, Implementation of Executive Order 11652 on Classification, Declassification and Safeguarding National Security Information, Interagency Classification Review Committee, Mar. 31, 1973, at 3 [hereinafter cited as ICRC Progress Report].

¹⁷⁵ See 1972 Hearings, *supra* note 8, at 2855-56, 2885-86.

¹⁷⁶ *Id.* at 2849-83. On March 21, 1972, Congressman William S. Moorhead (D-Pa.), chairman of the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee, entered into the Congressional Record an analysis prepared by the subcommittee staff, two months before the NSC Directive was issued. Although the analysis raises many pertinent issues, certain criticisms are based on a very narrow interpretation of passages which when read in the context of the Order and the Directive appear quite free of the deficiencies attributed to them. For example, one alleged defect is that the Order "[c]ontains no requirement to depart from the general declassification rules, even when classified information no longer requires protection. . . ." *Id.* at 2850. However, NSC Directive states in the first sentence of section II(A) that "classified information and material shall be declassified as soon as there are no longer any grounds for continued classification within the classification category definitions set forth in Section 1 of the Order." 37 Fed. Reg. 10053, 10054 (1972).

¹⁷⁷ 37 Fed. Reg. 10053 (1972).

¹⁷⁸ See 1972 Hearings, *supra* note 8, at 2681. David Young, the former Executive Director of the ICRC, stated at a White House press conference on May 17, 1972:

What we have put out today, in the NSC Directive, is really, for want of a better phrase, intended to put teeth in the order. The President has set out the purposes and we have tried to make it detailed and clear on what the bureaucracy is to do under the order. *Id.*

ICRC Progress Report indicates that further reductions in the number of classifiers will continue as evaluation of the various departments' classification requirements progress. Presently, all major departments are reviewing their authorized Top Secret classifiers to determine whether additional reductions can be achieved.¹⁷⁹

Beyond reducing classifiers, section four of the Order imposes personal responsibility "for the propriety of the classification attributed" to each classifier.¹⁸⁰ The theme of individual responsibility is emphasized throughout this section,¹⁸¹ and is indirectly indicated in section two, which requires that all delegation of classifying power be made "in writing."¹⁸² These provisions are given effect by the NSC Directive requiring:

Each Department listed in Section 2(A) of the Order [to] . . . maintain a listing by name of the officials who have been designated in writing to have Top Secret classification authority. Each Department listed in Section 2(A) and (B) of the Order shall also maintain separate listings by name of the persons designated in writing to have Secret authority and persons designated in writing to have Confidential authority.¹⁸³

A closer look at these provisions indicates that two different results occur under such procedures. First, lists of all officials having the *power* to classify are compiled and submitted to the ICRC¹⁸⁴ on a quarterly basis as ordered in the NSC Directive.¹⁸⁵ These tell who *can* classify. Second, however, lists of officials who are *actually using* this power to classify are not compiled. This is because section 4(B) of the Order states that it is sufficient to identify only the individual at the highest level that authorized such classification—thus totally circumventing specific, personal identification of the actual user.¹⁸⁶ The effect of this indirect method of imposing responsibility cannot be assessed at this early date. It is apparent, however, that the Order's theory of using personal responsibility to deter abuses of classification would have much more success if each document carried the identity of the actual classifier.¹⁸⁷

Ignoring this problem of identification, the ICRC is now considering a proposal that each person given Top Secret classification power be sent a letter "outlining the important provisions of the Order and Directive."¹⁸⁸ The committee evidently believes that by employing such a procedure coupled with inspection programs, a department will have the ability to hold individuals responsible for classification abuses.¹⁸⁹ Until such inspection programs are spelled out, the sufficiency of the ICRC proposal is doubtful in light of the scope of the monitoring task.

A potential problem of a more confusing nature concerns the use of control labels which are not classification devices, but which still limit access to the material upon which they are stamped. One State Department official explained their function in terms of a "need-to-know" principle—the labels indicate which persons within an agency or a family of agencies are entitled to receive information on the particularly subject.¹⁹⁰ Despite the fact that such a label does not

¹⁷⁹ See ICRC Progress Report at 3.

¹⁸⁰ Exec. Order No. 11652, § 4, 3 C.F.R. 375, 379 (1973).

¹⁸¹ *Id.*, 3 C.F.R. at 379–80. See section 4(B) stating that ". . . where the individual who signs or otherwise authenticates a document or item has also authorized the classification, no further annotation as to his identity is required." Section 4(D) states:

A holder of classified information or material shall observe and respect the classification assigned by the originator. If a holder believes that there is unnecessary classification, that the assigned classification is improper, or that the document is subject to declassification under this order, he shall so inform the originator who shall thereupon re-examine the classification. *Id.*, 3 C.F.R. at 380.

¹⁸² *Id.* §§ 2(A)–(C), 3 C.F.R. at 377–78.

¹⁸³ NSC Directive, § I(D), 37 Fed. Reg. at 10053.

¹⁸⁴ See ICRC PROGRESS REPORT at 5.

¹⁸⁵ NSC Directive, § I(D), 37 Fed. Reg. at 10053.

¹⁸⁶ Exec. Order No. 11652, § 4(B), 3 C.F.R. 375, 379 (1973).

Unless the Department involved shall have provided some other method of identifying the individual at the highest level that authorized classification in each case, material classified under this order shall indicate on its face the identity of the highest authority authorizing the classification. *Id.*

¹⁸⁷ See 1972 Hearings, *supra* note 8, at 2859. The subcommittee's analysis places the blame for the "watering-down" of original draft suggestions for individual identification on the Department of Defense. *Id.*

¹⁸⁸ ICRC PROGRESS REPORT at 5.

¹⁸⁹ *Id.*

¹⁹⁰ See 1972 Hearings, *supra* note 8, at 2477–78 (testimony of William D. Blair, Deputy Assistant Secretary of State for Public Affairs). See also *id.* at 2705–06 (testimony of Ralph E. Erickson, Assistant Attorney General, Office of Legal Counsel, Department of Justice).

determine document's availability to the public, critics argue that control labels are an unnecessary source of confusion. It is clear, however, that such devices are sanctioned by section nine or the Order, which states:

The originating Department or other appropriate authority may impose, in conformity with the provisions of this order, special requirements with respect to access, distribution and protection of classified information and material, including those which presently relate to communications intelligence, intelligence sources and methods and cryptography.¹⁹¹

Critics contend that such previously informal designations as "Limited Official Use," "Eyes Only," "Sensitive," and others will be legitimized under the Order. The result feared is that the proliferating stamps will lead to confusion and "add to the classification bureaucracy's stranglehold over such information."¹⁹² It is also feared that the labels could be used to keep important classified material from persons with legitimate interests, for instance, who have been excluded from distribution presumably in order to prevent the discovery of mistakes.¹⁹³

While it is conceivable that unscrupulous officials could utilize the control labels in such a manner, the controls appear to be a necessary instrument to direct access and distribution. Their purpose to act as a mailing or routing device which allows a superior to disseminate the matter labeled, whether classified or not, to a particular subordinate for a particular use,¹⁹⁴ thus providing a method of streamlining the internal administration and distribution of information. The major problem with the Order's approval of such controls is that it failed to bring any uniformity to the existing system. A recent study by the Congressional Research Service shows that 63 control labels are now in active use including such exotic acronyms as "CRYPTO," "ATOMAL/COSMIC," and "SPECAT."¹⁹⁵ While such labels are not directly related to classification and public access questions, an opportunity to bring order to another potential problem area was unjustifiably ignored.

As a final measure toward eliminating excess classification, the Order provides in section 13 that any employee "who unnecessarily classifies or overclassifies information or material shall be notified that his actions are in violation . . . of this order."¹⁹⁶ Repeated abuse will result in an administrative reprimand.¹⁹⁷ The NSC Directive similarly provides that such abuses may be dealt with by "formal reprimand" or "to the extent permitted by law, suspension without pay and removal."¹⁹⁸ Criticism of this aspect of the Order and Directive has been directed toward two issues: lack of specific penalties for abuses and lack of control over blanket applications of classification.

The first criticism is absolutely true. Yet, the question then becomes whether every agency and department must bear the responsibility of matching every possible abuse with a corresponding penalty. It would seem entirely appropriate to leave to the departments the discretion to establish penalties within the guidelines set down by the Order and the Directive. If, however, abuses of the classification process consist of unlawful dissemination of material, the accused individual may be prosecuted under the relevant sections of the federal criminal code.¹⁹⁹

The second criticism, concerning lack of control over the blanket classification process, is more complicated. Such a system of blanket classification developed from the need to protect highly sensitive information and material generated by persons lacking authority to classify. An example of such material would be blueprints of weapons systems drawn by individuals working in private industry. This problem has been combatted in the following manner:

[V]arious departments issue *classification guides* to be used by individuals in government and industry who do not have classification authority. By means of these guides, individuals who do not have classification authority are advised and directed how to apply classification markings to information which they generate.²⁰⁰

¹⁹¹ Exec. Order No. 11652, § 9, 3 C.F.R. 375, 385 (1973).

¹⁹² 1972 *Hearings*, *supra* note 8, at 2879.

¹⁹³ *See id.*

¹⁹⁴ *See id.* at 2497-98.

¹⁹⁵ *See id.* at 2493-97.

¹⁹⁶ Exec. Order No. 11652, § 13(A), 3 C.F.R. 375, 386 (1973).

¹⁹⁷ *Id.*

¹⁹⁸ *See NSC Directive*, § X(D), 37 Fed. Reg. at 10063.

¹⁹⁹ *See* Exec. Order No. 11652, 3 C.F.R. 375 (1973). The relevant code sections are 18 U.S.C. §§ 793, 794, 798 (1970).

²⁰⁰ ICRC Progress Report at 3-4 (emphasis added).

As a result, administrative sanctions would seem to have little effect on such persons who are outside the scope of the Order and yet possess the potential to abuse the power to classify. Recognizing this problem, the ICRC is now examining the classification guides to determine if they are adequate to control the volume of classified information.²⁰¹ Other questions under consideration are whether the departments on their own authority should restrict the number of persons allowed to apply classification guides.²⁰² It is encouraging to note that this problem has at least been recognized and solutions are being sought—the related problems of control labels and personal responsibility have been relatively ignored.

Progress toward the goal of preventing overclassification is apparent. Although there are areas where difficulties exist, charges that the Order has failed to tighten controls on classifiers are simply wrong. The recent statistics provided by the ICRC are substantive evidence of accomplishment.²⁰³ If the trend that is visible today continues, the bulk of classified material produced in future years should be significantly reduced.

B. Facilitation of Downgrading and Declassification

Executive Order 11652's second major area of concern is making available to the public all material presently classified which no longer needs protection for national security reasons. This goal is being pursued by several different means. First, as provided by the NSC Directive, when there is no longer a need for information to remain classified, it will be declassified without regard to the ten-year general declassification schedule (GDS).²⁰⁴ To encourage early declassification, classifiers must, whenever possible, mark material with a specific date or event after which access may be properly gained.²⁰⁵ The next method used is the GDS, which automatically declassifies Top Secret material after ten years, Secret material after eight year, and Confidential material after six years.²⁰⁶ However, even if such information is exempted from the GDS in accord with section 5(B) of the Order, it must also carry a specific rate or event, if ascertainable, to indicate when it may be later declassified.²⁰⁷ Finally, the Order directs that all classified documents thirty or more years old must be declassified unless "the head of the originating Department personally determines in writing at that time" that "continued protection is essential to the national security or disclosure would place a person in immediate jeopardy."²⁰⁸ In addition, mandatory review makes it possible to request that a specific classified document or file be reviewed for declassification.²⁰⁹

To evaluate how these various methods of declassification are progressing and what problems are being encountered in their implementation, three areas will be examined: the World War II declassification project, the *Foreign Relations of the United States* series published by the Department of State, and the recently established data index system.

1. World War II Declassification

The World War II declassification project is the prime example illustrating the changes brought on by the Order. Early in 1971, before the Order was issued, officials of the Department of State, Department of Defense, and the National Archives initiated a plan to declassify all World War II documents no longer needing protection (90% or more of the total).²¹⁰ Originally this plan estimated that the task of declassifying 160,000,000 pages of documents would require 114 people working for five years, at a cost of \$6.3 million.²¹¹ Departments such as Defense and State would render assistance to the National Archives, which had been designated as the appropriate agency to carry out the program.²¹² Hindered by congressional refusal to fund it immediately,²¹³ the project declassified less

²⁰¹ See *id.* at 4.

²⁰² See *id.*

²⁰³ See *id.* at Appendix A, 1-4.

²⁰⁴ NSC Directive, § II(A), 37 Fed. Reg. at 10054.

²⁰⁵ *Id.*

²⁰⁶ See text accompanying notes 132-36 *supra*.

²⁰⁷ See Exec. Order No. 11652, § 5(B), 3 C.F.R. 375, 380-81 (1973); NSC Directive, § II(A), 37 Fed. Reg. at 10054.

²⁰⁸ Exec. Order No. 11652, § 5(E) (1), 3 C.F.R. 375, 382 (1973).

²⁰⁹ See text accompanying notes 147-60 *supra*.

²¹⁰ See O'Neill, *Secrecy and Disclosure: The Declassification Program of the National Archives and Records Service*, 1973 Prologue: J. Nat'l Archives 43.

²¹¹ *Id.* at 43-44.

²¹² *Id.* at 43.

²¹³ *Id.*

than two million pages before the implementation of the Order on June 1, 1972.²¹⁴ After implementation, more than 29 million pages were declassified during the remainder of 1971.²¹⁵

The Order greatly expedited declassification by requiring that World War II documents be declassified by 1975 in accord with the 30-year declassification rule of section 5(E).²¹⁶ This decree resulted in the creation of a new Records Declassification Division within the National Archives, plus the establishment of additional declassification programs in other agencies.²¹⁷ For instance, the Department of the Army has employed over 200 intelligence reserve officers, 35 Adjutant General Corps reserve officers, and numerous other consultants to aid in declassification.²¹⁸ It is obvious that the Order's 30-year rule enlarges the task of the National Archives by delegating responsibility for such declassification to the Archivist of the United States.²¹⁹ The assistance which is being provided by the other agencies, however, should serve to cut the cost of the World War II declassification by nearly 40 percent.²²⁰ This project is well under way, and its progress is significant. From these indications, the future of the 30-year declassification rule is bright.

2. The Foreign Relations Series

The *Foreign Relations of the United States* is an official compilation of American foreign policy documents published by the State Department.²²¹ First issued in 1861, *Foreign Relations* has grown from a little known appendix of diplomatic correspondence²²² to a highly regarded, multi-volume account of the nation's foreign policy.²²³ In recent years, however, the time lag between events and the publication of the volumes covering those events has increased to approximately 25 years, despite the official policy of holding the delay to 20 years.²²⁴ This deterioration of timeliness has come under increasing attack because the *Foreign Relations* series has been the key component of the State Department's declassification system.²²⁵ Under that policy, the files of the Department were limited to official use until the volumes dealing with their contents had been published.²²⁶

In response to this slow process, President Nixon issued a memorandum to the Secretary of State on the day the Order was signed directing him to reduce the time lag to 20 years by 1975.²²⁷ In this memorandum there is no reference to *Foreign Relations* as a declassification tool although this has probably been one of its major functions in recent years.²²⁸ It is clear from a reading of the memo with the Order and the NSC Directive that *Foreign Relations*, once "the point of

²¹⁴ See ICRC Progress Report at 6.

²¹⁵ See *id.* at Appendix B. See also N.Y. Times, Apr. 25, 1973, at 14, col. 4.

²¹⁶ See O'Neill, *supra* note 210, at 44.

²¹⁷ *Id.* at 45.

²¹⁸ See ICRC Progress Report at 7. Assistance by reserve officers is particularly helpful as it eliminates the need for a security check of such officers who already possess clearances. One of the problems encountered by recruiters for the new Records Declassification Division is the necessary delay (an average of two months) for a security check of prospective employees. *Id.* at 7-8; telephone interview with Director, Harry S. Truman Library, Independence, Mo., May 23, 1973.

²¹⁹ Exec. Order No. 11,652, § 5(E) (2), 3 C.F.R. 375, 382 (1973).

²²⁰ This is the assertion of James E. O'Neill, Deputy Archivist of the United States. See O'Neill, *supra* note 210, at 44-45.

²²¹ ICRC Progress Report at 8.

²²² See Barker & Fox, *supra* note 1, at 28.

²²³ See AHA Newsletter, Sept. 1972, at 27-28.

²²⁴ *Id.* at 28. Office of the Federal Register, Public Papers of the Presidents of the United States: John F. Kennedy—1961, 591-92 (1962). President Kennedy addressed letters to the Secretary of State, Secretary of Defense, Secretary of the Treasury, and the Administrator of General Services (who oversees the National Archives) to request that the then 20-year lag be reduced.

In my view, any official should have a clear and precise case involving the national interest before seeking to withhold from publication documents or papers fifteen or more years old. *Id.* at 592.

²²⁵ AHA Newsletter, Sept., 1972, at 28-29.

²²⁶ Barker & Fox, *supra* note 1, at 33; Leopold, *The Foreign Relations Series Revisited: One Hundred Plus Ten*, 59 J. Am. History 935, 952 (1973).

²²⁷ S. Pros. Docs., *supra* note 3, at 550-51. The President also directed the Secretary of Defense, Director of the CIA, and the Assistant to the President for National Security Affairs to aid the Department of State in the endeavor. *Id.* at 551. According to the ICRC Progress Report, volumes dealing with American relations with Germany, Austria, and China for the year 1948 are now being published. ICRC Progress Report at 8. In addition, papers have been compiled for six volumes for 1949. *Id.* "For the first time, a net chronological advance has been made toward the goal of bringing the series to a twenty-year line within the next several years." *Id.*

²²⁸ AHA Newsletter, Sept., 1972, at 28-29.

The staff responsible for the *Foreign Relations* series is in fact the key component of the State Department's declassification system. In selecting and compiling documents for publication, it initiates consideration of declassification. In publishing the series, it gives declassification meaning by making cleared documents readily available to scholars, the press, and the public at large. *Id.*

the declassification spear for the most important foreign policy documents,"²²⁹ has lost this position. As noted earlier, classified information must now carry on its face, whenever possible, a date or event indicating when downgrading or declassification shall occur.²³⁰ *Foreign Relations* publication should in no way affect such procedure. Similarly, the mandatory review provisions²³¹ do not state that declassification must be postponed until publication of the series. Mandatory review operates independently and, in essence, nullifies the access policy of the Department of State, as controlled by *Foreign Relations*.²³²

The effect of the Order on the *Foreign Relations* series is not only to eliminate it as a declassification instrument, but to narrow its scope in future years. In the past, the staff of the State Department's Historical Office (which is responsible for the compilation of *Foreign Relations*) has collected documents from all of Washington, D.C. as well as the presidential libraries.²³³ After implementation of the Order, however, classified information, determined to be of permanent value, is subject to continual review by the custodial agency or the National Archives (if transferred thereto).²³⁴ Furthermore, under section 11 of the Order the National Archives is given unprecedented authority to declassify presidential papers.²³⁵ These innovations alone would appear to eliminate the need for the Historical Office to scour the bureaucracy for important foreign policy documents, at least for declassification purposes.

Contrary to this position, the director of the Historical Office, William M. Franklin, argues that the release of documents through the series has significant advantages.

In contrast to a haphazard releasing of individual documents, the series presents all the important documents on each subject in context. . . . The release of documents through official publication is obviously equitable; there are no favorites and no "scoops." Placed in their historical setting, the documents are often easier for the [State] Department to declassify and release because in such context their release is less likely to be misunderstood as having some current political significance.²³⁶

It would seem that Dr. Franklin's position is not in accord with the thrust of the new declassification system, for the Order gives a clear mandate to such "haphazard" releases under the mandatory review process²³⁷ and the authority given to the Archivist of the United States to declassify material held by the National Archives²³⁸—including presidential libraries.²³⁹

²²⁹ Barker & Fox, *supra* note 1, at 33.

²³⁰ See text accompanying notes 204-05 *supra*.

²³¹ See text accompanying notes 147-60 *supra*.

²³² Telephone interview with National Archives staff member, Washington, D.C., Apr. 10, 1973.

²³³ See Barker & Fox, *supra* note 1, at 31; interview with Director, Harry S. Truman Library, Independence, Mo., Apr. 9, 1973; telephone interview with National Archives staff member, Washington, D.C., Apr. 10, 1973.

The principles for the compilation and editing of the *Foreign Relations* series are stated in Department of State regulations and are published in the preface of each volume. Concerning the scope of documentation, the regulations state:

These volumes include, subject to necessary security considerations, all documents needed to give a comprehensive record of the major foreign policy decisions within the range of the Department of State's responsibilities, together with appropriate materials concerning the facts which contributed to the formulation of policies. When further material is needed to supplement the documentation in the Department's files for a proper understanding of the relevant policies of the United States, such papers should be obtained from other Government agencies. 1 U.S. Dep't of State, *Foreign Relations of the United States*, 1946, at III-IV (1972).

Closely analyzed, the latter sentence does not follow the first. The latter implies that the first has limited the scope of documentation to State Department files when, in fact, there is no such limitation. The language there refers to "all documents" "within the range" of the Department's "responsibilities," plus any other "appropriate materials" which would be helpful. The Historical Office need not, and does not, limit itself solely to Department of State records under this regulation. *Id.*

²³⁴ See *NSC Directive*, § III(A), 37 Fed. Reg. at 10055. Note, for example, the declassification effort of the Atomic Energy Commission which recently scrutinized the contents of 321,559 Los Alamos documents, declassifying 166,910. ICRC Progress Report at 9.

²³⁵ Exec. Order No. 11652, § 11, 3 C.F.R. 375, 385 (1973).

²³⁶ Franklin, *The Availability of Department of State Records*, 68 Dep't State Bull. 101, 103 (1973).

²³⁷ See text accompanying notes 147-60 *supra*.

²³⁸ Exec. Order No. 11652, §§ 3(E), 11, 3 C.F.R. 375, 379, 385 (1973). Section 3(E) provides that classified information in the hands of the National Archives shall be declassified "in accordance with this order, directives of the President issued through the National Security Council and pertinent regulations of the Departments." *Id.* at 379. Under section 11, however, the Archivist may declassify presidential papers in accord with the donor's deed of gift, provisions of section 5 (probably referring to the exemption criteria), and consultations (not concurrence) with departments having primary subject matter interest. *See id.* at 385. There is no requirement that the Archivist follow departmental regulations in section 11.

²³⁹ Formal guidelines for the establishment and maintenance of presidential libraries were enacted by Congress in the Presidential Libraries Act of 1955. See 44 U.S.C. § 2108 (1970).

Reluctance on the part of the Historical Office to accept this diminished role in the declassification process annoys archivists who feel that the new government policy clearly intends to abrogate past practices.²⁴⁰ Part of this reluctance is no doubt due to the Historical Office's belief that the series is the best method for declassifying such a large number of documents.²⁴¹ However, there also appears to be a desire on the part of the Historical Office that the Department of State, through the Historical Office, retain the great amount of influence it presently possesses in controlling foreign affairs documents in other agencies and departments.²⁴² Such a bureaucratic interest is hardly a policy reason for continuing the status quo.

Thus, although the Order may take away some of the prestige of the Historical Office and its *Foreign Relations* series, this should not affect the volumes' overall value as a historical research tool.²⁴³ The fact that foreign policy information will now be available earlier and in a greater quantity is reason enough to accept this change of role.

3. Data Index System

The third area to be examined is the data index system which, when fully implemented, will provide valuable assistance as a declassification and access aid for departmental as well as public requests. The data index system, which is set out in the NSC Directive,²⁴⁴ is a series of indices covering selected categories of classified documents having historical or other permanent value.²⁴⁵ The ICRC has stated that the system was adopted pursuant to the general policy of the Order establishing a "credible and sound security classification system."²⁴⁶ Specifically, the ICRC believes the system will

assist the departments in managing their classified documents and monitoring implementation of the Order. It will facilitate inspection as to proper marking, assist in conducting periodic declassification review, aid in evaluating the need for classification authority, insure better protection for material that is classified, and facilitate public access to classified records as they become declassified.²⁴⁷

Maintained by all departments originating classified information, the index contains a separate identification for each listed document which permits retrieval within a short period of time.²⁴⁸ The nature of the document is not revealed by this method; the identification is accomplished by providing, for example, the name of the classifier, the department of origin, and classification category.²⁴⁹ The identifying data elements required for the index are contained in the NSC Directive,²⁵⁰ and what appears to be a supplemental list is found in

The Libraries are administered by the Office of Presidential Libraries of the National Archives and Records Service. There are six libraries at present: Herbert Hoover Library, Franklin D. Roosevelt Library, Harry S. Truman Library, Dwight D. Eisenhower Library, John F. Kennedy Library, and Lyndon B. Johnson Library. See U.S. Gov't Organization Manual 1971/72 456 (1971).

²⁴⁰ Telephone interview with National Archives staff member, Washington, D.C., Apr. 10, 1973.

²⁴¹ See Barker & Fox, *supra* note 1, at 38; Franklin, *The Availability of Department of State Records*, 68 Dep't State Bull. 101, 103 (1973).

²⁴² Interview with staff members, Harry S. Truman Library, Independence, Mo., Apr. 9, 1973; see letter from Theodore Wilson (professor of history, University of Kansas) to William M. Franklin (Director, Historical Office, Department of State), Sept. 16, 1970, on file in Harry S. Truman Library.

²⁴³ Professor Lloyd C. Gardner, chairman of the history department of Rutgers University, testified:

The publication of the Foreign Relations series will remain important, but unless some program for publication of other records is undertaken, or, at least for access by outside scholars within a reasonable time, our understanding of the decision-making process in the cold war will be seriously diminished. Once the furor over the "Pentagon papers" has died down, and the people think that the Executive order is taking care of the classified document problem, interest in the publication of the Foreign Relations series will diminish, and there will be a return to postwar "normalcy."

1972 *Hearings*, *supra* note 8, at 2647.

²⁴⁴ NSC Directive, § VII, 37 Fed. Reg. at 10061-62.

²⁴⁵ See *id.*; ICRC Progress Report at 11.

²⁴⁶ ICRC Progress Report at 11.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ See note 250 *infra*.

²⁵⁰ NSC Directive, § VII, provides:

The index system shall contain the following data for each document indexed: (a) Identity of classifier, (b) Department of origin, (c) Addressees, (d) Date of Classification, (e) Subject/Area, (f) Classification category and whether subject to or exempt from the General Declassification Schedule, (g) If exempt, which exemption category is applicable, (h) Date or event set for declassification, and (i) File designation, 37 Fed. Reg. at 10,061.

the ICRC Progress Report.²⁵¹ Documents are retained in the index until they are declassified.²⁵² In departments where the volume of classified material is high, the data index will normally be computerized.²⁵³ Required by the Directive to be implemented by July 1, 1973, the index is to cover the selected categories of information that were classified after December 31, 1972.²⁵⁴ To ensure that the system functions according to plan, certain periodic and on-call reports will be requested by the ICRC.²⁵⁵

The progress currently being made in implementing the data index system has pleased the Interagency Committee, and all major originators of classified material, except the Department of Defense, have specifically determined which material will be covered by the index.²⁵⁶ Although the need for such a system has been obvious for some time, before the Order only the National Archives appeared to have a similar policy of aiding researchers seeking classified material.²⁵⁷ As a means of increasing public access²⁵⁸ to classified documents, the data index requirement is a significant step forward. Although the ICRC has not yet set a date when the index is to be in operation and possibility of delay exists, the preliminary steps which have been taken are welcome.

4. Summary

The changes in declassification procedures initiated by the Order are modifying past practices in a significant way. The 30 million pages of World War II material declassified in six months is a prime example of the speed with which declassification may be accomplished. Aids such as the data index system should facilitate declassification and be especially valuable in identifying documents sought for mandatory review. A possible bottleneck in the declassification of foreign policy documents may result from the Historical Office's desire to maintain its pre-eminence in this area. As discussed earlier, there is no basis for the Office to continue controlling access to State Department documents on the basis of publication of the *Foreign Relations* series, for other procedures available in

²⁵¹ The ICRC Report stated:

The following data elements will be included: (1) classifier; (2) title or description of the document; (3) subject matter index terms; (4) geographical area reference code; (5) date of document; (6) classification category; (7) declassification schedule; (8) exemption category, if any; (9) declassification date or event; and (10) number of addresses.

ICRC Progress Report at 11.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ NSC Directive, § VII, 37 Fed. Reg. at 10,061-2.

²⁵⁵ ICRC Progress Report at 11.

²⁵⁶ The ICRC anticipated that coverage would begin as follows:

State—All documents received or transmitted in Washington and entered into its Central Files.

CIA—All finished intelligence documents originated by CIA each year.

Justice—All classified documents originated by Justice.

Defense—Specific coverage is not yet determined, but Defense will build on existing systems, resulting in a number of decentralized indices.

AEC—All Top Secret documents originated by AEC and Secret and Confidential documents having permanent retention value.

NSC—All classified documents originated and received by the NSC. *Id.* at 12.

²⁵⁷ Telephone interview with National Archives staff member, Washington, D.C., Apr. 10, 1973. When a document is withdrawn from the open files for security purposes, evidence is left in the file to describe the document so deleted. Although such policy was initiated before mandatory review, it now gives the user more knowledge to be able to describe the desired document with the "sufficient particularity" necessary for a request under the procedure. *Id.*

²⁵⁸ It should also be noted that section 12 of the Nixon Order continues to grant access to classified files to cleared historians, which was permitted under Executive Order 10816 of May 8, 1959. See Exec. Order No. 11652, § 12, 3 C.F.R. 375, 385-86 (1973); Exec. Order No. 10816, § 2, 3 C.F.R. 1959-63 Comp. 351, 351-52 (1964).

Although this procedure has been criticized as being selective and arbitrary, see generally Barker & Fox, *supra* note 1, at 78-84, others claim that clearance has been granted to a large number of historians and not just a privileged few. Telephone interview with National Archives staff member, Washington, D.C., Apr. 10, 1973.

Under section 12 of the Nixon Order, access is also granted to persons who previously occupied policy-making positions to which they were appointed by the President. Both historians and former officials are restricted by two general requirements: that access be clearly consistent with national security and that no classified information be published or compromised. In addition, former officials may examine only those papers which they "originated, reviewed, signed or received" while in office. See Exec. Order No. 11652, § 12, 3 C.F.R. 375, 385-86 (1973).

The basic problem in this area is the lack of uniform access. If the government is going to allow these "peeks" into classified records, it should insure as much equality as possible. At present this access program is decentralized, and remains with the various departments. According to a former staff member of the ICRC, the idea of a standard application form applying to all classified records is being explored to bring some uniformity to the system. See Information and Records Administration Conference, *Implementing Executive Order 11652*, (Dec. 15, 1972), at 16.

the Order negate this policy. Nevertheless, it appears likely that a bureaucratic fight is imminent.

C. The Interagency Classification Review Committee

The ICRC is vested with the duties of monitoring the Order's implementation.²⁵⁹ To a large extent, the success of the committee in carrying out its functions²⁶⁰ will determine the success of the Order as a whole. The evidence gathered during the first year of the ICRC's existence shows an energetic and progressive body working to realize the goals set by the Order and the Directive. Under its tutelage, mandatory review has become an active means of checking the propriety of classifications of specific documents. Between June 1 and December 31, 1972, 252 declassification requests were made from various departments and agencies.²⁶¹ 136 requests were granted in full and 12 in part; 62 were denied and 42 were pending at the end of the year.²⁶² The ICRC received three appeals from denials of requests by the departmental committees, and reversed a lower decision refusing to declassify the Top Secret "Gaither Report" of November, 1957.²⁶³ The report was subsequently released to the public on January 5, 1973.²⁶⁴

To fulfill the role of monitor the ICRC has established a management reporting system which is designed to evaluate the whole classification/declassification program periodically.²⁶⁵ Under this system all agencies and departments must submit a series of quarterly reports covering five specific areas. These areas include: names and titles of all authorized classifiers, classification abuses, unauthorized disclosures, and results of mandatory declassification review requests.²⁶⁶ A quarterly summary report is also required to give a statistical account of documents classified by departments during such period.²⁶⁷ As the first series of reports was not due until the end of the April 1-June 30, 1973 quarter, their contents are not available for evaluation.²⁶⁸

The most serious problem confronting the ICRC now is one of internal administration. Since late April, 1973, the committee has been plagued by major resig-

²⁵⁹ See NSC Directive, § IX(C), 37 Fed. Reg. at 10062.

²⁶⁰ See text accompanying note 163 *supra*.

²⁶¹ See ICRC Progress Report at Appendix C.

²⁶² *Id.* It must be remembered that a request may be denied not only because the information sought still requires protection. If the information is not described with "sufficient particularity" to enable identification or if it cannot be obtained without a "reasonable amount of effort," a request may also be denied. See text accompanying notes 147-57 *supra*.

The breakdown among agencies is as follows:

	Total requests	Granted		Denied	Pending
		Full	Part		
State.....	48	8	2	29	6
Atomic Energy Commission.....	3	0	3	0	0
Justice.....	7	4	0	2	1
NSC.....	22	7	0	7	8
CIA.....	30	1	6	15	8
National Archives.....	19	10	1	2	6
Civil Service Commission.....	3	2	0	1	0
National Science Foundation.....	1	1	0	0	0
Commerce.....	2	2	0	0	0
Defense.....	115	100	0	6	9
Others.....	2	1	0	0	1
Total.....	252	136	12	62	42

²⁶³ The author of the report was officially known as "The Security Resources Panel of the Office of Defense Mobilization Science Advisory Committee" and had been appointed by President Eisenhower in April 1957, to conduct an independent examination of how to provide for civil defense in case of nuclear attack. It developed, however, into an examination of the deterrent value of American retaliatory forces. The panel found that by 1959 the Soviet Union would have the capability of launching a nuclear attack against the United States, that the civilian population would be unprotected, and that most American planes would be vulnerable. Subsequently this Top Secret report was leaked to the press and a "roughly accurate account soon appeared in a local publication," according to Eisenhower himself. See D. Eisenhower, *Waging Peace* 219-23 (1965); H. Parmet, *Eisenhower and the American Crusades* 536-37 (1972). Despite this leak, the report remained classified Top Secret for 15 more years until finally released after three administrative reviews—a perfect example of overclassification and needless secrecy.

²⁶⁴ See ICRC Progress Report at 1-2.

²⁶⁵ *Id.* at 13.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 14.

²⁶⁸ *Id.*

nations which might affect its ability to monitor the Order's implementation with any great degree of consistency. The resignation of Chairman John Eisenhower²⁶⁹ in April, 1973 was closely followed by the departure of Executive Director David R. Young²⁷⁰ in May, 1973. J. Fred Buzhardt, the Defense Department's representative, also left the ICRC in May, moving into a White House position.²⁷¹

The ability of the Interagency Classification Review Committee to work under such handicaps is directly related to the response of the bureaucracy to the Order's demands. The energetic efforts characteristic of the ICRC's first year of operation must not be decreased, and the White House should make every effort to appoint people to fill the empty spaces who will be dedicated to the policies of the Order. In a governmental system of checks and balances, all participating forces must possess an equivalent amount of power to attain a working relationship. In the framework of the Order, a weakening of the ICRC's effectiveness would be disastrous to the balance sought between secrecy and disclosure.

C. *The New Role of the Government Archivist*

A change which pervades Executive Order 11,652, but which does not immediately stand out as a major reform, is the new role that is given to the government archivist. As will be shown, this change in the archivist's role could have a profound impact on future declassification policies and procedures. Prior to the Order, the National Archives and its staff were not recognized by law or otherwise as part of the declassification process.²⁷² To understand why this past practice was clearly inadequate and why the change is significant, a short digression into archival administration is necessary.

A distinguished scholar in this field has defined "archives" as follows:

Those records of any public or private institution which are adjudged worthy of permanent preservation for reference and research purposes and which have been deposited or have been selected for deposit in an archival institution.²⁷³

Of course, this Note's discussion relates only to *public* archives belonging to the federal government. It is the purpose of the National Archives and Records Service (NARS)²⁷⁴ to select, preserve and make available to the government and the public these permanently valuable noncurrent records.²⁷⁵ NARS is also charged with the promotion of improved records management and paperwork practices in the federal agencies,²⁷⁶ which logically should include procedures involving classified information.

National Archives personnel, however, were not included in the declassification process despite the fact that the archivists' expertise in evaluating the permanent significance of such material would certainly enable them to make capable judgments concerning the propriety of declassification.²⁷⁷ After World War II, re-

²⁶⁹ N.Y. Times, Apr. 25, 1973, at 14, col. 4. President Nixon later designated Dr. James B. Rhoads, Archivist of the United States, as Acting Chairman of the ICRC. 9 Weekly Compilation of Presidential Documents 420 (1973).

²⁷⁰ N.Y. Times, May 3, 1973, at 1, col. 8; at 33, col. 1. Young, who quit without formal explanation in the wake of the Watergate Affair, was known to be one of two persons chosen by former White House adviser John Ehrlichman to investigate the Pentagon Papers leak. The other was Egil Krogh. This investigation eventually led to the burglary of the office of a psychiatrist who had treated Daniel Ellsberg, at that time on trial for having made the papers public. *Id.*

²⁷¹ *Id.*, May 11, 1973, at 1, col. 8; 1972 *Hearings*, *supra* note 8, at 2827.

²⁷² Telephone interview with National Archives staff member, Washington, D.C., Apr. 10, 1973.

²⁷³ T. Schellenberg, *Modern Archives* 16 (1956).

²⁷⁴ The National Archives Establishment, originally created in 1934, became the National Archives and Records Service following the enactment of the Federal Property and Administrative Services Act of 1949. U.S. Gov't Organization Manual 1971/72 455 (1971): 14 Fed. Reg. 7569 (1949).

²⁷⁵ U.S. Gov't Organization Manual 1971/72 455-56 (1971).

²⁷⁶ *Id.* at 456.

²⁷⁷ Such a conclusion can be drawn from the stated purposes of the National Archives, *see* text accompanying notes 275-76 *supra*, and from the following description of the work of the National Archives by Philip C. Brooks, former Director of the Harry S. Truman Library and noted archivist:

The most important contribution of the National Archives, in appraising records either for disposal or for transfer, is that of judgment from the research point of view. There is no reason to suppose that administrative officials, busy with current duties, can know to what extent their records may be called upon in later years by historians, political scientists, economists, sociologists, statisticians, genealogists, and a wide variety of other users whose work constitutes research. The National Archives, on the other hand, with its stated objective of making records available both to Government and to the people, is accumulating a body of experience from

sponsibility for national security information became firmly entrenched with the law enforcement and security personnel of the government.²⁷⁵ The role of the government archivist was limited by statute which stated:

Records, the use of which is restricted by law or for reasons of national security or the public interest, shall be inspected or surveyed in accordance with regulation [*sic*] promulgated by the Administrator [of General Services], subject to the approval of the head of the custodial agency.²⁷⁹

Thus, the Administrator of General Services, the head of a family of agencies including NARS,²⁸⁰ was always under the control of the originating or custodial body. This situation has been changed by the Order which, in three sections, puts the archivists into the field.²⁸¹

Section 3(E) for the first time gives authority to the Archivist of the United States to downgrade and declassify information transferred to the General Services Administration for accession into the National Archives.²⁸² The process must take place in accordance "... with this order, directives of the President issued through the National Security Council and pertinent regulations of the Departments."²⁸³ While the hand of the Archivist is not totally free, this section has been interpreted to eliminate "... the need for specific delegations of authority from each agency," and to "... sharply reduce the time and paper previously expended in routing individual documents to the agencies for declassification action."²⁸⁴

Section 11 of the Order provides wider and unprecedented authority for the Archivist to review and declassify information in his possession "which has been classified by a President, his White House Staff or special committee or commission appointed by him. . . ." ²⁸⁵ Until this provision, presidential documents existed in a classification limbo with no one possessing clear authority to declassify.²⁸⁶ This authority of section 11 is broader than that of section 3(E) for it must be exercised within the terms of the donor's deed of gift (that is, if papers are restricted by a donor), the normal declassification procedures of section five, but only in "consultation with the Departments having primary subject-matter interest."²⁸⁷ The distinction between "consultation" and "concur with" is important, as the former gives the Archivist much more independence in declassifying presidential documents.²⁸⁸ The third provision noting the authority of the Archivist to declassify is section E(5) (2) regarding documents over 30 years old classified before the Order.²⁸⁹

Past reasons for keeping government archivists relatively apart from the declassification process are not altogether clear, although an overzealous concern for security growing out of the McCarthy era has been suggested as one rationale.²⁹⁰ The exclusion of archivists from the process of preserving and declassifying classified information may have resulted in the massive accumulation of paper the government is burdened with today. However, their involve-

which it knows the kinds of records . . . that are sought. . . . Brooks, *Archival Procedures for Planned Records Retirement*, 11 Am. Archivist 308-314 (1948).

T. R. Schellenberg describes in general the role of the archivist, which may easily be interpreted as the role the archivist should play in the declassification process:

In order to make their review systematically, archivists should participate in the development of comprehensive programs for the disposition of the records of the agencies with which they deal. They should promote, and perhaps sometimes participate in making surveys that are intended to obtain information on the content and value of records. They should interest themselves in all such activities of government that affect the disposition of records. T. Schellenberg, *Modern Archives* 32 (1956).

²⁷⁵ Telephone interview with National Archives staff member, Washington, D.C., Apr. 10, 1973.

²⁷⁹ 44 U.S.C. § 2906 (1970).

²⁸⁰ U.S. Gov't Organization Manual 1971/72 451 (1971).

²⁸¹ In addition to the provisions of Executive Order 11652, it is also significant to note that since the Order's implementation, President Nixon has amended section 7(A) of the Order to include the Archivist of the United States as a permanent member of the ICRC. Exec. Order No. 11714, 9 Weekly Compilation of Presidential Documents 420 (1973).

²⁸² Exec. Order No. 11652, § 3(E), 3 C.F.R. 375, 379 (1973).

²⁸³ *Id.*

²⁸⁴ O'Neill, *Secrecy and Disclosure: The Declassification Program of the National Archives and Records Service*, 1973 Prologue: J. Nat'l Archives 44. See 1972 Hearings *supra* note 8, at 2606.

²⁸⁵ Exec. Order No. 11652, § 11, 3 C.F.R. 375, 385 (1973).

²⁸⁶ See note 284 *supra*.

²⁸⁷ See Exec. Order No. 11652, § 3(E), 11, 3 C.F.R. 375, 379, 385 (1973).

²⁸⁸ Telephone interview with National Archives staff member, Washington, D.C., Apr. 10, 1973.

²⁸⁹ Exec. Order No. 11652, § 5(E) (2), 3 C.F.R. 375, 382 (1973).

²⁹⁰ Telephone interview with National Archives staff member, Washington, D.C., Apr. 10, 1973.

ment in national security information declassification is virtually secured at present. The trained archivist with experience in interpreting agency guidelines for declassification is fully qualified to do such work.²⁹¹ As time passes, the competence of the archivist increases and the competence of a departmental program officer decreases as far as each's ability to determine in a distinterested manner whether classification is still required for a particular document.²⁹² A partial recognition of this axiom is embodied in the Order, but in order for the goals of declassification and early access to be attained, a full recognition and appreciation of the role of the government archivist is necessary.²⁹³

V. CONCLUSION

Although this Note has covered a wide range of topics, historical as well as contemporary, its focus remains on the general feasibility and operation of the classification and declassification procedures of President Nixon's Executive Order 11,652. To adequately analyze the Order it was necessary to outline the development of governmental custody of its valuable papers. Beginning with the early statutes giving the departments the power to preserve and protect their papers, the Executive gained the upper hand over Congress in controlling such information. This pre-eminence in the field of government information has led to the continuing controversy over the Executive's right to withhold information from Congress because of an alleged "executive privilege."

Apart from this controversy, government records continued to accumulate, but in a most disorganized fashion. The establishment in 1934 of the National Archives, a federal depository for documents requiring preservation, helped to eliminate this problem, but a larger crisis loomed on the horizon. With the coming of the New Deal and then World War II, a full-fledged bureaucracy ensconced itself in Washington, D.C. and with it came the "paper explosion." This modern bureaucratic phenomenon greatly increased the number of government records and caused concern as to how to safeguard highly sensitive information which needed to be kept from general circulation. The classification system was thus created to prevent unauthorized disclosure of "national security information," but the system soon spawned problems of its own—overclassification, hypersecrecy, and inadequate declassification procedures.

These problems were first dealt with by the Truman Executive Order of 1951. However, the definitions used to describe the four classification categories were loose, delegation of classification authority was uncontrolled, and declassification was to be used only "wherever possible." With these inadequacies apparent, the Eisenhower administration in 1953 issued its proposal which, though slightly amended, controlled the process until 1972. It eliminated the fourth classification category of Restricted, decreased the number of agencies with classification power, and limited the delegation of authority to classify. Nevertheless, the definitions of classified material remained broad and declassification made little progress. Despite an effort by the Kennedy administration to stimulate declassification, there was still a need for reform.

Executive Order 11,652 is the best effort made by an administration to cope with the problems of national security information and needless government secrecy. Its major innovations are the automatic declassification schedule, the mandatory review procedures for declassifying a specific document or file, and the Interagency Classification Review Committee (ICRC) which monitors the Order's implementation. For the first time, the burden is placed on the agencies and the departments to show that continued classification is necessary when a request for declassification is made. The Order is not without its problems, however. Although the ICRC boasts that it has reduced the number of classifiers by 63 percent, it has ignored the problem of the Order's present inability to specifically identify which individual is personally responsible for the classification of a particular document. Such personal accountability is necessary for purposes of monitoring possible abuses. It has also failed to deal with the proliferation of control labels which, although innocently used as routing devices, pose a threat as a de facto classifying system within the official classifying system. Even though the National Archives staff is being encouraged to enter the declassification process, various sectors in the bureaucracy continue to resent

²⁹¹ See 1972 *Hearings*, *supra* note 8, at 2612.

²⁹² Telephone interview with National Archives staff member, Washington, D.C., Apr. 10, 1973.

²⁹³ For an excellent discussion of the archivist's problems in dealing with government information and material, see O'Neill, *The Accessibility of Sources for the History of the Second World War: The Archivist's Viewpoint*, 1972 Prologue: J. Nat'l Archives 21-23.

the presence of outsiders who may release information before officials are ready to see it in the public domain.

Establishing reforms in the area of classification and declassification of national security information is a slow and painstaking process. A major reason for its initial success is that presidential pressure, in the form of the Order, has been applied toward the early disclosure of information no longer requiring protection and against the abuses of the classification authority. However, contemporary events in Washington seem to have fostered a change of attitude in the White House, indicating that secrecy in government is perhaps not as reprehensible as once thought. President Nixon himself has called for a "new sense of dedication" among government personnel to insure that if a document is classified, it will remain classified.²⁹⁴ Although no one would deny the Executive the right to classify information needing protection, experience over the past 25 years has taught us to be skeptical of the classification process. Any retreat from the spirit of disclosure and access embodied in Executive Order 11,652 would only serve to destroy confidence in government at a time when it is needed most.

²⁹⁴ See N.Y. Times, May 25, 1973, at 16, cols. 4-5. The following are excerpts from President Nixon's address to former American prisoners of war:

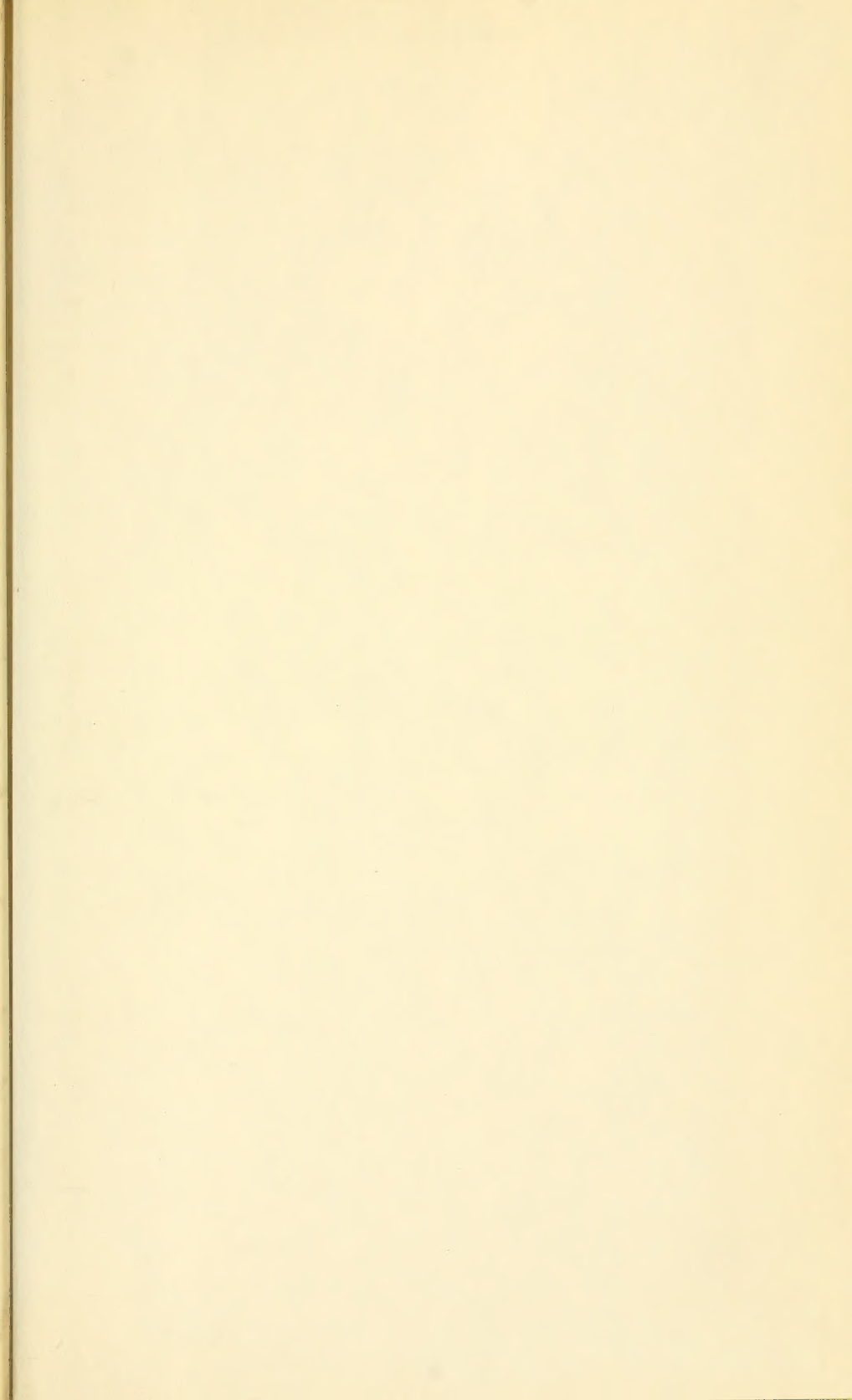
And let me say, I think it is time in this country to quit making national heroes out of those who steal secrets and publish them in the newspapers. . . .

. . . I can assure you that in my term of office as President in the first four years, and also in this second four years, I am going to meet my responsibility to protect the national security of the United States of America insofar as our secrets are concerned.

. . . [w]hat I am concerned about is the highest classified documents in our national security council files, in the State Department, in the Defense Department, which if they get out, for example, in our arms control negotiations with the Soviets, would let them know our position before we ever got to the table. They don't tell us theirs. They have no problem in keeping the secrets.

I don't want, and you don't want, their system and that kind of control, but I say it is time for a new sense of responsibility in this country and a new sense of dedication of everybody in the bureaucracy that if a document is classified, keep it classified.





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